

Fresh Thoughts on an Ancient Remedy: Updating North Carolina's Real Property Partition Laws (Vers. 5/15/17)

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Introduction.

This article is intended to provide North Carolina real estate practitioners with background on ongoing efforts by the North Carolina General Statutes Commission (GSC)² to update and improve statutory partition remedies applicable to real property in the Old North State. For purposes of this article, the term “partition” means “the division of real property held jointly or in common by two or more persons into individually owned interests.”³ The article does not consider partition of interests in personal property.

In Part I, the article first considers the history of partition laws in North Carolina. In Part II, it then highlights major policy considerations and evolving issues identified by review of national treatises, law review literature, and consultation with property

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² The General Statutes Commission (GSC) is charged by statute:

- (1) To advise and cooperate with the Legislative Services Office in the work of continuous statute research and correction ...
- (2) To advise and cooperate with the Legislative Services Office in the preparation and issuance of supplements to the General Statutes ...
- (3) To make a continuing study of all matters involved in the preparation and publication of modern codes of law.
- (4) To recommend to the General Assembly the enactment of such substantive changes in the law as the Commission may deem advisable.
- (5) To receive and consider proposed changes in the law recommended by the American Law Institute, by the National Conference of Commissioners on Uniform State Laws or by other learned bodies.

[NC Gen. Stat. § 164-13].

The GSC is composed of members appointed by the House, Senate, Governor, President of the State Bar and Bar Association, deans of the state's law schools, and the Commission itself. NC Gen. Stat § 164-14. Information on the Commission's meetings is available on its website, located at:

<http://www.ncleg.net/gascripts/DocumentSites/browseDocSite.asp?nID=227>

³ Black's Law Dictionary (10th ed. 2014).

professors and real estate practitioners nationally. Policy issues such as these might reasonably play a role in driving statutory reform of North Carolina's partition laws.

In Part III, the article summarizes key provisions of the Uniform Partition of Heirs Property Act (UPHPA).⁴ As defined in that Act and as used in this article, "heirs property" is a term of art that refers to land held in tenancy in common, acquired from relatives (typically by will or by intestacy) and held in substantial part by related parties, in the absence of a recorded co-tenancy agreement.⁵ As discussed in more detail below, the treatment of "heirs property" under traditional partition mechanisms has resulted in substantial land loss particularly affecting poor and minority families whose agricultural lands have been sold to outside interests often at below-market prices.⁶ The UPHPA creates a fairer and more expeditious regime applicable only to "heirs property" (not to other situations involving tenants in common or joint tenants), insofar as it mandates use of an independent appraiser and allows co-tenants to "buy out" each other without a forced sale of the whole property in certain circumstances.

In Part IV the article briefly outlines other possible improvements in state statutes which, in the author's view, might be worthy of consideration in North Carolina. The article concludes by inviting readers with experience in this area to submit comments on possible reforms for consideration by the Commission.

I. History and Evolution of Real Property Partition Law in North Carolina.

A. English Traditions.

Scholars trace the "right to partition" back at least to 13th century England, and the time of Henry III when it arose in connection with the tenancy in "coparcenary"⁷ (a form of concurrent ownership arising as a result of descent of property rights to more

⁴ The Uniform Partition of Heirs Property Act (UPHPA or "Uniform Act") was developed through a major initiative of the American Bar Association Real Property Section, working with the Uniform Law Commission. Extensive background information is available on the Uniform Law Commission website: <http://www.uniformlaws.org/Act.aspx?title=Partition%20of%20Heirs%20Property%20Act>

⁵ Section 2(5) of the UPHPA adopts the following definition:

"Heirs property" means real property held in tenancy in common which satisfies all of the following requirements as of the filing of a partition action:

- (A) there is no agreement in a record binding all the cotenants which governs the partition of the property;
- (B) one or more of the cotenants acquired title from a relative, whether living or deceased; and
- (C) Any of the following applies:
 - (i) 20 percent or more of the interests are held by cotenants who are relatives;
 - (ii) 20 percent or more of the interests are held by an individual who acquired title from a relative, whether living or deceased; or
 - (iii) 20 percent or more of the cotenants are relatives.

This definition is considered in more detail in the text at note 89 – 92.

⁶ See sources cited at note 70, note 90, and text at notes 84-86.

⁷ At common law, "coparcenary" "arose when, on the death of the owner of an estate of inheritance, it descended to two or more female heirs, in default of a male heir, and likewise when, by local custom, land descended to two or more male heirs." 2 TIFFANY REAL PROP. § 429 (3d ed.). If a coparcener died, that individual's interest would pass to the heirs of the decedent. *Id.*

than one person through inheritance).⁸ Subsequently, under Henry VIII, the right of partition was extended to real property owners who were tenants in common or joint tenants.⁹

B. North Carolina's Early Approach.

North Carolina's own statutory regime concerning partition appears to date from as early as 1770 with revisions in 1775.¹⁰ Strikingly, some aspects of the legislative statement of purpose might have been written just yesterday. The legislature observed that common law proceedings for partition "are tedious, chargeable, and often ineffectual."¹¹ Problems had apparently also arisen because tracts of land extended into differing counties, and because much of North Carolina's land "are so extremely poor and barren" that "minute" partitions were problematic (in contrast to the experience in England, "where every single acre is separately of real value").¹² The legislature also observed that diverse persons with undivided land "are greatly oppressed and prejudiced," and that premises were frequently "wasted or destroyed, or lie uncultivated and unmanured so that the profits of the same are totally or in a great measure lost."¹³ Clearly, at the time of this original legislation, fundamental concerns driving policy makers included a desire to efficiency in the handling of disputes, use of procedures suitable to the characteristics of North Carolina's land, treatment of landowners fairly and

⁸ See A.C. Freeman, COTENANCY AND PARTITION 540-41 (2d Ed., 1886) (hereinafter referred to as "Freeman"). Freeman provided the following rationale: "When the creation of the cotenancy was not the result of agreement, purchase, or the act of the parties, it was clear that they were in no way blamable for its existence, and the law early provided means by which either might terminate its existence, and obtain an estate in severalty in lieu of an undivided interest." *Id.* at 540. Freeman further cited the work of Mr. Reed, writing about the state of the law in 1292. Reed summarized the ancient process as follows:

"when an inheritance descended to more than one heir, and they could come to no agreement among themselves concerning the division of it, a proceeding might be instituted to compel a *partition*. A writ was for this purpose directed to four or five persons, who were appointed 'justices for the Occasion, and were to *extend* and appreciate the land by the oaths of good and lawful persons chosen by the parties, who were called *extensores*; and this extent was to be returned under their seals, before the king or his justices: when partition was made in the king's court, in pursuance of such extent, there issued a *seisinam habere facias*, for each of the *parceners* to have possession."

Freeman further observed that "As the same author spoke of this reign as the period in which, after having travelled 'through the profound darkness of the Saxon times, and the obscure mist in which the Norman constitutions are involved, we approach the confines of known and established law,' it is probable that the proceedings for partition of which he wrote, though not mentioned before the reign of Henry III, were in existence at an earlier period, but are concealed from view by the 'darkness' and the 'obscure mist' of the more remote times."

For additional historical insights, see Clark D. Knapp, A TREATISE ON THE LAW OF PARTITION OF REAL AND PERSONAL PROPERTY 4-6 (1887) (hereinafter referred to as "Knapp"). For a discussion of antecedents to partition practices found in Roman law, see John Mark Huff, *Chop It Up or Sell It Off: An Examination of the Evolution of West Virginia's Partition Statute*, 111 W. VA. L. REV. 169, 173 (2008).

⁹ Knapp, *supra* note 8, at 7-8.

¹⁰ See Chapter 34 North Carolina Sessions Laws, 1756-1776.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

without prejudice, and avoidance of waste or destruction of land value. These issues will be revisited in connection with current-day policy questions, below.

The statutory scheme developed at this early stage, was fairly rudimentary. A party (coparcener, joint tenant or tenant in common) filed an action in superior court for the district in which the land in question was located.¹⁴ The clerk of court issued a summons to affected co-tenants, directing them to appear.¹⁵ If co-tenants failed to appear, the court was directed to examine the relevant title and “part or purport.”¹⁶ The court was also directed to set out portions of the property in severalty (that is to engage in partition in kind).¹⁷ The statute included protections against default judgments for those under various forms of disability.¹⁸ The statute also addressed contingencies relating to the availability of the sheriff to enforce related orders.¹⁹ The statute finally provided that it should have force for five years and no longer.²⁰

By 100 years later, after the Civil War, a much more complex statutory scheme was in place.²¹ This subsequent version focused in much more depth on the role and perquisites of commissioners appointed to manage the process of partition, including their role in the process and their compensation.²² Perhaps the most notable aspect of the later statute (adopted in 1868) was its articulation of the circumstances in which partition in kind and partition by sale could be invoked. Section 1904 of the 1868-69 statute provided that:

Whenever it appears by satisfactory proof that an actual partition of the lands cannot be made without injury to some or all of the parties interested, the court shall order a sale of the property described in the petition, or any part thereof, on such terms as to size of lots, place or manner of sale, time of credit and security for payment of purchase money, as may be most advantageous to the parties concerned, and, on the coming in of the report of sale and confirmation thereof, and payment of the purchase money, the title shall be made to the purchaser or purchasers at such time and by such person as the court may direct, and in all cases where the persons in possession have been made parties to the proceeding, the court may grant an order for possession.²³

C. North Carolina’s Statutory Framework Prior to 2009.

It may help readers seeking to assess the need for changes in the North Carolina real property partition statute to review the statute as it stood in 2008 (prior to changes

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ See Chapter 47, 1 William T. Dortch et al. The Code of North Carolina, March 2, 1883.

²² *Id.*

²³ *Id.*

adopted in 2009).²⁴ The North Carolina statutes' basic provisions²⁵ addressed the following matters, as the statutes stood prior to reforms discussed below.

As a general matter, Article 1 of Chapter 46 provides that

- *Special Proceeding.* Partition is a “special proceeding” that is governed by associated statutes. (NC Gen. Stat. § 46-1).
- *Venue.* Venue is situated in the county in which the land lies. (NC Gen. Stat. § 46-2).
- *Filing and Interim Orders.* A petition for partition can be filed in superior court by persons claiming real estate as joint tenants or tenants in common, or by a decedent co-tenant's representative under certain circumstances. (NC Gen. Stat. § 46-3). The court also has authority to make orders during the pendency of the proceeding. (NC Gen. Stat. § 46-3.1).
- *Summons and Notice.* A summons is issued and written notice given of the right to seek advice from an attorney and the potential for an award of attorney's fees. (NC Gen. Stat. § 46-2.1).
- *Role of Commissioners.* A panel of three disinterested commissioners plays a crucial role in partition proceedings. They are appointed by the superior court and are called by the sheriff to meet on the premises and partition the land by dividing the land into shares equal in value to reflect the concurrent owners' rights. They can also specify owelty charges (payment of funds to equalize shares if the property itself cannot be divided altogether to reflect apportioned value). They must file a report, which is then confirmed and enrolled. (NC Gen. Stat. §§ 46-7, 46-7.1, 46-8, 46-9, 46-10, 46-11, 46-12).
- *Surface Rights, Mineral Rights, and Liens.* Article I also addresses the treatment of surface and mineral rights if separately owned (partition can be used by concurrent owners of one or the other as between themselves only). (NC Gen. Stat. § 46-4). It further addresses the use of a partition petition by a judgment creditor of one of the co-tenants, including the implications for that co-tenant's homestead rights. (NC Gen. Stat. § 46-5).

Article 2 of Chapter 46 addresses partition sales of *real property* in additional detail.

- *Partition in Kind or by Sale.* The statute addresses the question of when the court should order sale of the property as opposed to an actual division in kind of the land itself so that each co-tenant would hold rights in severalty to a specifically

²⁴ This article does not consider partition of personal property as addressed in NC Gen. Stat. §§ 46-42-46-44.

²⁵ See NC Gen. Stat. Chapter 46. See also 1-7 WEBSTER'S REAL ESTATE LAW IN NORTH CAROLINA § 7.14

designated portion of the land. Prior to 2009 amendments the statute expressed a clear preference for partition in kind, insofar as it read as follows:

the court shall order a sale of the property described in the petition, or of any part, only if it finds, by a preponderance of the evidence, that an actual partition of the lands cannot be made without substantial injury to any of the interested parties.... The party seeking a sale of the property shall have the burden of proving substantial injury under the provisions of this section.”

[NC Gen. Stat. §46-22, *as it read prior to 2009*]

- *Present versus Future Interests.* The existence of a life estate does not bar concurrent owners of remainders or reversions from bringing a partition action, but that action may not interfere with the life tenant’s possession during the existence of his estate. (NC Gen. Stat. § 46-23). However, a life tenant may join in the proceeding and, if the land is sold, the life tenant is to be paid the value of his or her share (annually or based on the value of the probable life of the life tenant). (NC Gen. Stat. § 46-24).
- *Timber Interests.* The statutes also address rights to standing timber, insofar as a variety of disputes can arise. There may be disagreements about timing and extent of timber sales as between concurrent owners of possessory rights, or as between a life tenant and holders of future interests. A partition action may be brought to sort out such rights, either by concurrent owners or the life tenant. Prior to entering a judgment that would allow a life tenant to proceed with a proposed timber sale, the court is directed to make findings that cutting “is in keeping with good husbandry” and that “no substantial injury will be done to the remainder interest.” (NC Gen. Stat. § 46-25).
- *Mineral Interests.* The statutes also expressly address how mineral interests should be handled in partition actions. The court is directed to determine whether it “would be for the best interests of the tenants in common, or joint tenants to have the same sold, or if actual partition of the same cannot be had without injury to some or all of such tenants.” If the court determines the interests should be sold, the proceeds are to be divided according to “the interests of the parties as may appear.” (NC Gen. Stat. § 46-26).
- *Sale Procedures.* Provisions in Chapter 1, Article 29A (relating to judicial sales) generally govern except to the extent that different provisions relating to notice are set forth in N.C. Gen. Stat. § 46-28. Subsection (b) provides for mailed notice at least 20 days prior to judicial sale “to the last known address of all petitioners or respondents” who had previously been served.

2009 Committee Review and Amendments.

A legislative committee, co-chaired by then Representative (now Senator) Angela Bryant and then Senator Robert Atwater, considered the need for revisions in the North Carolina real property partition statutes during the period 2008-2009. The study committee that they convened received substantial evidence and made a number of recommendations, some of which were adopted. A copy of the study committee report is available on the GSC website.²⁶ Various observers have noted that the discussion of possible changes in partition law at that time gave rise to a good deal of acrimony.²⁷ The study committee report reflected the position of advocates for reform (particularly insofar as proposed reforms might assist minority families to retain rights to family farms), while also summarizing the view of the NC Bar Association's Real Property Section (who opposed changes and expressed the view that the existing system worked well as it stood).

It should be borne in mind that the discussions in this legislative study committee occurred before the completion of efforts by the American Bar Association and the Uniform Law Commission to reach consensus on a proposed Uniform Partition of Heirs Property Act that was adopted in 2010.²⁸ Some of the concerns that animated discussion within the 2008-2009 North Carolina legislative committee were similar to those that led to the development of the UHPA, but the UHPA was not available as a model at the time of the 2008-2009 North Carolina legislative deliberations. The UHPA, as adopted in 2010, reflected a much more surgical approach to concerns relating to land loss facing poor and minority farmers. Ultimately, some changes were made in certain aspects of North Carolina's partition law in 2009, as discussed below. Details of on the 2009 committee's proposals to deal with "heirs property" issues in North Carolina are also summarized below, and comparisons between the proposals discussed at that time and those incorporated in the 2010 UHPA are noted in the overview of the UHPA provided in Part III.

D. Changes Adopted in 2009.

A number of important changes in North Carolina's partition statutes were adopted in 2009.²⁹ These changes included the following:

- *Notice Requirements.* NC Gen. Stat. §46-6 was revised to require a clearer description of property potentially subject to partition. The court was also given authority, in its discretion, to appoint a party to represent unknown or un-locatable heirs.
- *Sale in Lieu of Partition.* NC Gen. Stat. § 46-22 was revised in significant respects to specify that in partition proceedings, the court is obliged to consider both evidence in

²⁶ See

<http://www.ncleg.net/gascripts/DocumentSites/browseDocSite.asp?nID=227&sFolderName=\GSC%20Meeting%20Agendas%20and%20Related%20Documents\GSC%202017%20Meeting%20Agendas%20and%20Related%20Documents\02-03-2017,%20Agendas%20and%20Related%20Documents\DN%2011-3%20-%20UPHA>

²⁷ Testimony of Thomas Steele before General Statutes Commission (January 6, 2017).

²⁸ See <http://www.uniformlaws.org/Act.aspx?title=Partition%20of%20Heirs%20Property%20Act>

²⁹ See N.C. S.L. 2009-512.

favor of actual partition and evidence in favor of partition by sale. The statute was further revised to clarify the standards for “actual partition” versus partition by sale. The revised version states that, in determining whether “actual partition” would cause “substantial injury” to any of the interested parties, the court needs to consider (1) whether the fair market value of each cotenant’s share through an in-kind partition would be “materially less” than the money equivalent through sale of the whole; and (2) whether an in-kind division would result in material impairment of any cotenant’s rights. The statute further directed the court to consider the remedy of owelty, and directed the court to make specific factual findings.

- *Mediation.* The statute further created a mechanism for mediation in partition proceedings. (NC Gen. Stat. § 46-22.1)
- *Sale Procedure.* (NC Gen. Stat. § 46-28): (*Giving Credit to Co-Tenant Who Enters High Bid*). This provision gives a co-tenant who entered a high bid for the property a credit for the fraction of the property he or she already owned. (NC Gen. Stat. § 46-28 (g))
- *Petition for Revocation of Confirmation Order.* (NC Gen. Stat. § 46-28.1). This provision allows the court to order an independent appraisal in some instances, including in situations in which the “amount bid or price offered is inadequate and inequitable and will result in irreparable damage to the owners of the real property.”
- *Impartiality: Clerk/Deputy/Assistant Clerk.* Those holding these positions were prohibited from appointing themselves to sell real property. (NC Gen. Stat. §46-31).

E. Changes Proposed but Not Adopted in 2009.

A number of other recommendations were proposed by the study committee but were not ultimately adopted. These recommendations included the following:

- *Extended Time.* The committee proposed that 30 days, rather than 10 days, be set as the time frame for answering a summons.³⁰ It also proposed allowing commissioners to take 90 days, rather than 60 days to submit their report.³¹
- *Notice.* The study committee proposed significantly enhanced notice requirements.³² In particular, the committee recommended revising § 46-4 to address situations in which partition was sought where unknown parties were potentially concerned. Petitioners would have been required to specifically allege facts showing what due diligence they had exercised in identifying such parties and effecting personal service. After such a showing the court would be required to order notice by publication including a description of the property. The court would also have been required (as

³⁰ Partition Sales Study Committee, pages 9-10 (proposed revision to § 1-394).

³¹ *Id.* at page 9.

³² *Id.* at page 10-11.

opposed to having discretion) to appoint a representative for parties who were unknown and unrepresented, and attorneys currently representing or previously representing parties in a related partition action would have been disqualified from serving in that capacity.

- *Impartiality of Commissioners: Attorneys.* The committee proposed that § 46-7 be amended to include more detailed definitions of impartiality and recommended that “attorneys who currently represent parties in a pending partition proceeding and those who have previously represented the parties in a related partition proceeding” be found not to be “disinterested” and therefore not to be allowed as commissioners unless by consent of the parties.³³
- *Ineligible Sellers.* The committee recommended that § 46-31 be amended to prohibit the following parties from selling or being appointed to sell property in a partition sale: the clerk of superior court (assistant clerk or deputy clerk) if there had been a proceeding before that clerk; and attorneys who currently represented a party in the pending partition proceeding on had previously represented parties in a related partition proceeding.
- *Ineligible Purchasers.* A new § 46-31.1 was proposed that would have rendered the following parties to be ineligible to purchase land in a partition sale: attorneys (or attorneys’ agents) who currently represent the parties or who represented the parties in a related proceeding; commissioners (or their agents) who had been involved in the partition proceedings at any time; and appraisers (or their agents) who have been involved in the partition proceedings at any time.
- *Independent appraisal prior to sale.* The committee recommended that if a party sought to revoke a confirmation order based on a failure of service, notice of sale, or “inadequate and inequitable” bid or price that would result in irreparable damage to the owners, the court would be required to order an independent appraisal (with costs apportioned pro rata).
- *Buyout Option.* The committee recommended adoption of a new § 46-22.1 that would have provided for an option for non-petitioning co-tenants to “buy out” an individual petitioning co-tenant’s interest rather than requiring the whole of the property to be sold. In such circumstances, the non-petitioning co-tenant would have between 15 and 30 days from the court’s decision that the property could not be partitioned in kind in order to exercise the buy-out option. The co-tenants could agree on a price or the court would be required to appoint an independent appraiser to recommend a valuation within 30 days (potentially a second appraisal might also be required). Costs of the appraisal would have been shared by all parties. A purchasing co-tenant would have 45 days to pay into court the value set for the petitioning party’s interest. The proposed buy-out option would not have applied where a written tenants-in-common or joint-tenants management agreement was in effect.

³³ *Id.* at page 11.

- *Partition in Kind versus Partition by Sale: Determining “Substantial Injury” with Reference to Multiple Factors.* As discussed above, § 46-22 addresses the decision whether to divide concurrently owned property “in kind” or “by sale” (that is, to sell the property and divide the proceeds). Historically, the language of this section stated that partition by sale “only if [the court] finds, by a preponderance of the evidence, that an actual partition of the lands cannot be made without substantial injury to any of the interested parties.” The section was amended in 2009 as discussed above to require the court to consider both whether “the fair market value of each cotenant’s share in an actual partition of the property would be materially less than the amount each cotenant would receive from the sale of the whole” and whether “an actual partition would result in material impairment of any cotenant’s rights.” The committee had proposed a more nuanced approach, specifying that the court would have to consider at least seven listed factors, no single one of which would be dispositive.³⁴
- *Attorneys’ Fees: No Fees for Opponents of Sale.* The committee also proposed to add a new § 46-22.2 that would have prohibited an award of attorneys’ fees against a non-petitioning cotenant who contests the partition or sale of the property by appearing in person before the court.³⁵

³⁴ These factors included the following:

- (1) whether the property is able to be divided between the party or parties seeking a partition by sale and those seeking to remain tenants in common;
- (2) whether a partition in kind would apportion the property in such a way that the value of the parcels resulting from the division, in the aggregate, would be materially less than the actual value of the property if it was sold as a whole, based upon a valuation that takes into account the type of sale conditions under which the court-ordered sale would occur;
- (3) evidence of longstanding ownership by any individual owner as supplemented by the period of time that any person or persons that such a cotenant is or was related to by blood, marriage, or adoption who was in the chain of title owned an interest in the property;
- (4) any owner’s particular sentimental links with or attachment to the property, including any attachments arising out of the fact that the property was ancestral or other unique or special value to one or more of the co-owners;
- (5) the use being made of the property by any of the owners and the degree to which this owner or owners would be harmed if they could not continue to use the property for these purposes;
- (6) the degree to which the owners have contributed their pro rate share of the property taxes, insurance, and other carrying charges associated with maintaining ownership of the real property as well as the degree to which the owners have contributed to the physical improvement or the upkeep of the property, including any upkeep related to protecting the interests of the owners against any person who has no legal claim to the property but who attempts to use the property without the consent of the owners; and
- (7) any other economic or non-economic factor that the court finds to be appropriate to consider.

Id. at pages 14-15. The factors also reflected developments in an important West Virginia case that had allowed non-economic factors to be taken into account in determining whether to partition land in kind or by sale. See *Ark Land Co. v. Harper*, 215 W.Va. 331, 599 S.E.2d 754 (2004). For a North Carolina article supporting this approach, see Lawrence Anderson Moye IV, *Is It All About the Money? Considering a Multi-Factor Test for Determining the Appropriateness of Forced Partition Sales in North Carolina*, 33 CAMPBELL L. REV. 411 (2010).

³⁵ See note 37 *infra* for a list of states that have adopted or are considering the Uniform Act.

Although certain aspects of the committee's recommendations resonate with provisions of the UHPA, as discussed below, an overarching point needs to be made before moving into the details. The proposals that were not passed in 2009 would have forced changes to *all* aspects of North Carolina's real property partition law, not only to the narrower circumstances in which the land to be partitioned is substantially held by family members based on intestate succession or will provisions. As the UHPA evolved, it was explicitly targeted *only to* situations relating to defined "heirs' property."³⁶ Thus, to the extent that the real estate bar in 2009 concluded that North Carolina law should not be revised *altogether* by importing policy considerations of particular significance in the more narrow context of "heirs property" to apply in all partitions, those concerns need to be reconsidered since the Uniform Act does not reach all types of partition actions as the 2009 proposals would have done.

II. Policy Considerations and National Developments

The General Statutes Commission's current efforts to review North Carolina's partition statutes respond to several different considerations and concerns that were shared with the Commission independently. One concern is to update the language and conceptualization of partition statutes so they are clearer and better reflect current realities ("should we really be using language and frameworks adopted from 13th century England and North Carolina history that preceded the Revolutionary War?"). A second consideration relates to the desire to simplify partition proceedings and make them easier to use, less costly, less time-consuming, and less susceptible to strategic behavior by co-tenants (for example should partition procedures be structured so as to encourage or discourage the potential for partition petitioners to make life difficult for family members and co-investors because of personal fallings out?). A third consideration relates to the growing embrace of the UHPA, now mature legislation that has been adopted by nine states (including South Carolina, Georgia, Alabama and Arkansas) with four others currently considering adoption.³⁷

In order to develop appropriate recommendations, members of the GSC and the attorneys who staff the Commission have sought to gain insight from a variety of sources. Staff attorneys looked closely at the UHPA, and also reached out to knowledgeable real estate practitioners in North Carolina to seek their impressions and advice. The GSC also heard testimony from leaders of the real estate bar and from two law professors (Associate Dean Faith Rivers James of Elon University College of Law and NCCU Dean Phyllis Craig-Taylor), both of whom have published scholarly articles on "heirs property" issues and were involved in the work of the Uniform Law Commission and the American Bar Association Real Property Section in developing the UHPA.³⁸ In preparing this

³⁶ For a definition of "heirs property," see note 5 *supra*, and discussion at notes 89-92 and accompanying text, *infra*.

³⁷ See <http://www.uniformlaws.org/Act.aspx?title=Partition%20of%20Heirs%20Property%20Act>. The jurisdictions that have adopted this legislation include Connecticut, South Carolina, Georgia, Alabama, Arkansas, New Mexico, Montana, Nevada and Hawaii. It has been passed by the Texas Senate and a Texas House Committee. Other states that have introduced the legislation as of this writing include Mississippi, District of Columbia, and Missouri.

³⁸ See Phyllis Craig-Taylor, *Through a Colored Looking Glass: A View of Judicial Partition, Family Land Loss, and Rule Setting*, 78 WASH. U. L.Q. 737 (2000) (considering heirs property issues); Faith Rivers,

article, the author sought insight from property professors across the country and real estate lawyers who subscribe to the “DIRT” national listserv, asking them to share recent developments in their respective states and perspectives on reform more generally. The author also reviewed major national treatises, North Carolina treatises, historical treatises, articles on partition³⁹, and statutes⁴⁰ on partition from around the country. This article, too, reflects an effort by the GSC to reach out to North Carolina real property lawyers with experience in partition, and sincerely requests input based on their experiences.⁴¹ The author’s goal is two-fold: (a) to encourage real property lawyers in North Carolina to understand more fully the rationales for possible changes and the scope of those changes; and (b) to urge knowledgeable real estate lawyers in North Carolina to offer their best insights to help the General Statutes Commission (and this author) reach recommendations that are as well-informed and insightful as possible.

This Part accordingly highlights key policy considerations that, in the author’s view (but not necessarily the GSC’s collective view), seem especially pertinent in considering possible reform of North Carolina’s partition laws. It therefore discusses two primary policy rationales (efficiency and fairness) and tracks ongoing national developments that seem designed to address each.

Academics like the author have traditionally had the opportunity to urge law students not only to learn what the law *is* (or appears to be), but to consider how the law

Inequity in Equity: The Tragedy of Tenancy in Common for Heirs’ Property Owners Facing Partition Inequity, 17 TEMP. POL. & CIV. RTS. L. REV. 1 (2007) (considering heirs property issues).

³⁹ In addition to articles cited elsewhere in this article, see, e.g., John G. Casagrande, Jr. *Acquiring Property Through Forced Partitioning Sales: Abuses and Remedies*, 27 B.C. L. REV. 755 (1986) (early article tracing history of partition generally; citing loss of family farms, particularly African-American family farms in Alabama and elsewhere in the south, as the courts gradually moved to partitioning by sale rather than in kind; arguing that this approach is inconsistent with equitable partitioning in kind; arguing that this trend fosters acquisition of property that would otherwise be unavailable).

⁴⁰ A helpful compilation of statutory references appears in 7-50 POWELL ON REAL PROPERTY § 50.07 [1], note 4. This note references the following statutes: Ala. Code § 35-6-20 et seq.; Alaska Stat. § 09.45.260 et seq.; Ariz. Rev. Stat. Ann. § 12-1211 et seq.; Ark. Code Ann. § 18-60-401 et seq.; Cal. Civ. Proc. Code § 872.010 et seq.; Colo. Rev. Stat. Ann. § 38-28-101 et seq.; Conn. Gen. Stat. Ann. § 52-495 et seq.; Del. Code Ann. tit. 25, § 721 et seq.; D.C. Code Ann. § 16-2901 et seq.; Fla. Stat. Ann. § 64.011 et seq.; Ga. Code Ann. § 44-6-140 et seq.; Haw. Rev. Stat. § 6681 et seq.; Idaho Code § 6-501 et seq.; Ill. Comp. Ann. Stat. ch. 735, § 5-17-101 et seq.; Ind. Code Ann. § 32-17-4-8; Iowa Code Ann. § 651.1 et seq.; Rules of Court Rule 270 et seq.; Kan. Stat. Ann. § 60-1003; Ky. Rev. Stat. Ann. § 381.135 et seq.; La. Civ. Code Ann. art. 807; La. Code Civ. Proc. Ann. art. 4601 et seq.; Md. Code Ann., Real Prop. § 14-107 et seq.; Me. Rev. Stat. Ann. tit. 14, § 6501 et seq.; Mass. Ann. Laws ch. 241; Mich. Stat. Ann. § 27A.3301 et seq.; Minn. Stat. Ann. § 558.01 et seq.; Miss. Code Ann. § 11-21-1 et seq.; Mo. Ann. Stat. § 528.010 et seq.; Mont. Code Ann. § 70-29-101 et seq.; Neb. Rev. Stat. § 25-21.100; Nev. Rev. Stat. Ann. § 39.010 et seq.; N.H. Rev. Stat. Ann. § 547-C:1 et seq.; N.J. Stat. Ann. § 2A:56-1 et seq.; N.M. Stat. Ann. § 42-5-1 et seq.; N.Y. Real Prop. Acts § 901 et seq.; N.C. Gen. Stat. § 46-1 et seq.; N.D. Cent. Code § 32-16-01 et seq.; Ohio Rev. Code Ann. § 5307.01 et seq.; Okla. Stat. Ann. tit. 12, § 1501.1 et seq.; Or. Rev. Stat. § 105.205 et seq.; 42 Pa. Con. Stat. Ann. § 1552; R.I. Gen. Laws § 34-15-1 et seq.; S.C. Code Ann. § 15-61-10 et seq.; S.D. Codified Laws Ann. § 21-45-1 et seq.; Tenn. Code Ann. § 29-27-101 et seq.; Tex. Prop. Code Ann. § 23.001 et seq.; Utah Code Ann. § 78-39-1 et seq.; Vt. Stat. Ann. tit. 12, § 5161 et seq.; Va. Code Ann. § 8.01-81 et seq.; Wash. Rev. Code Ann. § 7.52.010 et seq.; W. Va. Code § 37-4-1 et seq.; Wis. Stat. Ann. § 842.01 et seq.; Wyo. Stat. § 1-32-101 et seq.

⁴¹ Comments may be submitted to the Reviser of Statutes, Floyd Lewis, Floyd.Lewis@ncleg.net.

should be. Could the law be improved by legislative reform, well-grounded litigation strategies, or transactional work-arounds? Asking such questions inevitably leads to reflection on two broad types of policy concerns: efficiency and fairness. Those considerations are certainly worth considering in connection with partition reform.

A. *Efficiency.*

1. *Meaning.*

For many academics, assessment of “efficiency” may resonate with the principles of the law and economics movement, namely that the focus should be on how to reduce costs of transactions between two private actors, assuming that they are each equally positioned to maximize their personal economic interests, and that maximization of personal economic interests is the highest good.⁴² For good or ill, this author has never been one to embrace that view. It is based on abstractions that are irreconcilably removed from reality. Not all economic actors are equally wealthy so they are not equally positioned to advance their individual economic interests. Moreover, it is doubtful that market transactions are driven by totally rational judgments by completely “rational” actors. So, in this author’s view, the “law and economics” analysis is far from persuasive as a theory engaging with the world as we know it.

Some scholars, writing in the context of partition of “heirs property,” have described a somewhat related policy issue as a concern for “wealth,” that is a concern that partition laws should not diminish the ability to use land productively.⁴³ The “productive use” of land has a significant history as a driver of American legal policy (for example, in the context of awarding adverse possessors the rights to property when “true owners” fail to attend to and protect their interests). Other academics have challenged that long-time preference for “productive” use of land due to the risks it creates of prioritizing short-term development over longer-term stewardship and conservation.⁴⁴ An emphasis on “wealth” can also privilege certain parties (those who have more liquid assets and wish to develop and sell property interests) over others who lack liquid assets and wish to retain

⁴² See, e.g., Yun-Chien Chang & Lee Anne Fennell, *Partition and Revelation*, 81 UNIV. OF CHICAGO L. REV. 27 (2014) (using law and economics approach to discuss partition and related policies); Yun-Chien Chang, *Tenancy in “Anticommons”? A Theoretical and Empirical Analysis of Co-Ownership*, 4 J. LEGAL ANALYSIS 515 (2012) (treating property held in tenancy in common as an “anticommons” because it is likely to be underused and underinvested; using data from Taiwan, suggesting that cooperation between co-tenants is less likely than suggested, and that more than 4/5 of partition actions are conducted through voluntary agreements; finding that courts tend to order partition by sale when partition in kind would create excessively small plots); Zachary D. Kuperman, *Cutting the Baby in Half: An Economic Critique of Indivisible Resource Partition*, 77 BROOK. L. REV. 263 (2011) (analyzing modes of partition and criticizing them for failure to conform to specified economic criteria; normative economic criteria articulated include proportionality, envy-freeness, efficiency, administrability, equitability, and strategy-proofness; arguing for more systematic application of economic theory in driving partition analysis).

⁴³ See Jesse Richardson, Jr., *The Uniform Partition of Heirs Property Act: Treating Symptoms and Not the Cause?* 45 REAL EST. L. J. 507, 507 (2017) (hereinafter cited as Richardson, *Symptoms*). Professor Richardson is an associate professor and lead attorney for the land use and sustainable development clinic at the West Virginia University College of Law.

⁴⁴ See John Sprankling, *An Environmental Critique of Adverse Possession*, 79 CORNELL L. REV. 816 (1994)

property. “Efficiency” can thus be understood as a means of fostering productive use of property and preference for moving property into the hands of those who can most “productively” use it.

This article endeavors to use the concept of “efficiency” as neutrally as possible, and it employs the term primarily to refer to reduction in unnecessary friction or costs in resolving disputes between competing property owners. As discussed more fully below, some of the current tension regarding partition policy arises because of competing claims to develop the property in accordance with developers’ economic interests, or to retain land in an undeveloped state in accordance with some property owners’ preferences. The article accordingly attempts to take a more neutral stance that does not necessarily privilege one of these preferences over the other. Accordingly, as used here, “efficiency” relates to (a) establishing clarity in expectations; (b) increasing transparency (so all parties can possess information that facilitates dispute resolution), (c) encouraging agreements that head off wasteful litigation costs in the future, (d) adjusting dispute resolution systems to increase simplicity and reduce costs where complexity and costly methodologies are not necessary in the modern era, and (e) determining how best to treat intersecting non-fee interests (such as future interests, timber and mineral rights, and various liens) without incurring unnecessary costs. This section considers each of those matters in turn.

2. Implications for Reform: Emerging Trends Relating to Efficiency

a. Clarity of Expectations: Rights and Standards for Partition in Kind or Partition by Sale. As discussed earlier, a right to seek partition through an equitable proceeding has long been recognized as a mechanism for concurrent owners holding as tenants in common or joint tenants to dissolve the “concurrent” character of their holdings and move to owning interests in property in severalty. All states recognize such a right, and provide that the right can be exercised either through “voluntary” or “involuntary” (judicial) partition.⁴⁵ Some states recognize both statutory and common law versions of this right.⁴⁶

i. Partition in Kind v. Partition by Sale. Although most state *statutes* continue to give preference for partitions in kind, academic observers have in recent days

⁴⁵See 4-38 THOMPSON ON REAL PROPERTY, THOMAS EDITIONS, § 38.03(a)(1) (“Unless exceptional circumstances exist, any tenant in common or joint tenant has a right to seek a judicial partition of land in which the common interest is held. This right exists even where every other co-owner of the land objects to the partition. Objections to this right on constitutional grounds have not succeeded.”) (footnotes omitted). See also 2 TIFFANY REAL PROPERTY § 474 (3rd edition) (“The statement that partition is a matter of right is to be taken with some qualification. The right is subject to the power of the court, under the modern statutes, to decree a sale instead of a partition in kind”). For statutory provisions, see note 39, *supra*.

⁴⁶See 2 TIFFANY ON REAL PROPERTY § 473 (3rd edition) (“In this country, the jurisdiction of courts of equity has always been recognized, but in many of the states there are statutory provisions giving concurrent jurisdiction to common-law courts, or to the courts having probate jurisdiction, particularly in the case of partition of land belonging to a decedent’s estate.”) (footnotes omitted).

suggested that historic preferences for partition in kind may be honored in the breach.⁴⁷ Partitions in kind made sense when agricultural uses were preeminent and when concurrent owners likely expected that property would be divided in kind as a way of continuing the use for similar purposes. Since the founding of the Republic, much has changed. Perhaps it is time to reconsider whether statutory preferences for “in kind” partition should be revised in favor of “by sale” alternatives at least in settings involving concurrently owned property *not* held by families. Changing the statutory preference for “in kind” partition would represent a significant change from traditional practices in North Carolina or elsewhere, but the question is nonetheless worth considering. Recent practices elsewhere suggest that the time may be right to shift the basic approach from in-kind to by-sale partition in commercial contexts (even if not in heirs property contexts). For example, Iowa has rebalanced its historical preferences by adopting the following statutory provision that presumes that property should be partitioned by sale, but allows a party to request partition in kind based on showings of what is equitable and practicable:

Property shall be partitioned by sale and division of the proceeds, unless a party prays for partition in kind by its division into parcels, and shows that such partition is equitable and practicable. ... [Iowa Rule of Civil Procedure 1.1201(2)].

ii. *“Identity Property” versus “Commercial Property.”* Particularly if North Carolina adopted the Uniform Partition of Heirs Property Act, it might be possible to clarify the extent to which strategies for partitioning property held for commercial purposes (with best practices including use of co-tenant partition agreements), might properly differ from those governing properties held for personal and family purposes. A more far-ranging set of factors may be appropriate in determining whether in kind partition or partition by sale is appropriate when family property is at stake,⁴⁸ even if there is some ancillary interest in commercial development arising from the purchase of a family member’s share. The world has changed significantly since North Carolina’s early partition legislation and it may therefore be advisable to create more clearly distinct governing regimes as suitable for different circumstances involving concurrent interests. Undoubtedly, some developers would like to continue to rely on the current legal regime that provides them with the opportunity to purchase a fractional interest from a single concurrent property owner and then force a sale implicating all holders of that property so as to accelerate development (with the result that long-held family property is lost). But that long-standing practice is the incidental by-product of antiquated partition law and does not necessarily reflect current policy concerns that do not necessarily support giving priority to development interests at the cost of family farms.

b. *Voluntary Partition: Options for Advance Agreements.* One of the most significant national developments in recent years has been the increasingly wide-spread adoption of “co-tenant agreements” as a “best practice” when property is purchased by

⁴⁷ See 7-50 POWELL ON REAL PROPERTY § 50.07[5] (“most partitions today are indeed in the form of sale and division of proceeds”).

⁴⁸ See Uniform Act provisions discussed at note 94-97 and accompanying text, *infra*.

co-tenants in a business context.⁴⁹ National treatises devote considerable space to such developments,⁵⁰ and national form books do the same.⁵¹ Some states have explicitly authorized such agreements by statute to foster transparency,⁵² while others have blessed such agreements by judicial decisions.⁵³ It may therefore be timely for states, including North Carolina, to adopt forward-looking statutory provisions that authorize such agreements and specify how they might best be structured.

c. Involuntary Partition: Increased Transparency through Improved Notice and Protective Mechanisms. Involuntary partition involves judicial intervention to change the structure of ownership against the expressed interests of at least some co-tenants.⁵⁴ Involuntary partition may be invoked because not all owners of property are known or readily discoverable, so that there is no ready means to reach a unanimous agreement regarding the need for judicial intervention.⁵⁵ Increasingly, states have begun to create alternative procedures for notice and protection of “unknown heirs” particularly in the context of “heirs property” as discussed below.⁵⁶ The issue of “unknown heirs” is typically not present with regard to concurrently owned property held for commercial purposes. It may be advisable to consider these two distinct types of situations separately and address transparency, notice, and protection of property owners’ interests separately.

d. Involuntary Partition: Adjusting Dispute Resolution Systems to Foster Simplicity and Reduce Costs. Should North Carolina and other states continue to rely upon partition mechanisms that stem from the 18th century, or can we do better in terms of fostering simplicity and reducing costs in the current era?

Some states have created structures that give those seeking partition procedural options, depending on their circumstances. For example, California allows partition litigants or governing courts to opt into a procedure that uses a single appraiser rather than a panel of three “commissioners” or “referees” with associated responsibilities

⁴⁹ For discussion of the wide acceptance of agreements not to partition, see 4-38 THOMPSON ON REAL PROPERTY, THOMAS EDITIONS, § 38.03(a)(2)(1) (right to partition can be waived, generally in writing to comply with Statute of Frauds); § 38.03(a)(2)(ii) (permitted in testamentary dispositions and trusts, for a limited duration). For an example of a co-tenant agreement regarding investment property, see note , *infra*.

⁵⁰ See 7-50 POWELL ON REAL PROPERTY § 50.07[2] (“While cotenants have the right to compel partition, they often agree to voluntary, private partitions that require no judicial supervision. Cotenants may effect voluntary partition by a written agreement of all cotenants, by an exchange of deeds that dissolves the cotenancy, by ratification of a cotenant’s earlier conveyance of part of the land to an outsider, or by [other means].” (footnotes omitted)).

⁵¹ See 6F NICHOLS CYC. LEGAL FORMS §§ 149:9-149:23 (agreements among co-tenant heirs); 5AP1 NICHOLS CYC. LEGAL FORMS §§ 111.29-111.35.90 (agreements among co-tenants more generally).

⁵² States that have adopted the Uniform Partition of Heirs Property Act implicitly authorize tenants in common to adopt cotenant agreements relating to partition and management, consistent with the definition of “heirs property.” See note 5, *supra*, for definition for “heirs property.” See note 37, *supra*, for list of states adopting the Uniform Partition of Heirs Property Act.

⁵³ See notes 49-50 *supra*.

⁵⁴ See note 45, *supra*.

⁵⁵ See 7-50 POWELL ON REAL PROPERTY § 38.02 (“The key requirement of a voluntary partition is that all of the co-owners of the co-owned estate must join in the partition of the parcel”).

⁵⁶ See text at notes 105-106, *infra*.

in partition proceedings.⁵⁷ Similarly, legislatures may distinguish the responsibilities of “commissioners” and “appraisers” in responding to at least two distinct questions: whether property is suitable for division in kind, and what value should be allocated to property subject to sale.

Other dispute resolution frameworks are also worth considering. For example, Indiana recently amended its partition statutes to incorporate a *mandatory* court-ordered mediation requirement applicable to partition disputes.⁵⁸ The court is to refer disputes to mediation within 45 days of assuming jurisdiction, but mediation will not begin until a court-designated appraiser files an appraisal report (unless the parties waive this requirement). Co-tenants are also given an opportunity to agree on procedures for sale (by sheriff or by auction). The Indiana statute also addresses some other lingering issues that often give rise to disputes among co-tenants (for example, the statute confirms that a co-tenant who has paid taxes or special assessments will be reimbursed for such expenditures at the time of sale).

e. *Treatment of non-fee interests (future interests, timber and mineral rights, liens).*

Although holders of present concurrent fee absolute rights play the most central role in partition proceedings, there is also the potential for others with more limited rights to become frustrated by the complexity of partition actions as currently reflected in North Carolina statutes.

Currently, it is possible for concurrent owners of remainders or reversions to bring partition actions, but such actions may not defeat the life tenant’s possessory interest as noted above. Instead, the life tenant may join the action and in the event of sale receive the value of his or her share based on the life tenant’s probable life. Holders of timber and mineral interests are also allowed to bring partition actions by statute as noted above. For timber interests, where partition is sought at the behest of a life tenant, the test is whether a proposed sale of timber is “in keeping with good husbandry” and creates “no substantial injury” to the remainder interest. For mineral interests, the question is whether it would be “in the best interests” of the concurrent interest holders to have interests sold or partitioned.” It could well be desirable to create a simplified system for addressing at least timber and mineral interests where associated values are relatively modest. Perhaps one appraiser agreed upon by all parties could be appointed (rather than a three-person commission) and a designated sale price established by the court to assure accurate valuation and prompt resolution of disputes.⁵⁹

⁵⁷ See Cal. C.C.P. § 873.020 (“Appointment; one or more. The court in its discretion may appoint a referee for sale and a referee for division, or may appoint a single referee for both); Cal. C.C.P. § 873.940. Referees; appointment; report. The court shall appoint one referee or, if provided in the agreement, three referees to appraise the property and the interests involved. The referee shall report the valuations and other findings to the court in writing filed with the clerk”).

⁵⁸ See Indiana Code 32-17-4-2.5.

⁵⁹ See note 57 *supra* and accompanying text.

Finally, there may be some concern about the role and remedies of lien holders, including judgment lien holders and those holding mortgages, as to concurrently held property in the context of partition actions. North Carolina's partition statutes currently address the rights of judgment lien-holders to a limited extent.⁶⁰ However, greater clarity may be needed. Some preliminary commentary from North Carolina attorneys has suggested that there is a need for a more efficient system for clearing liens from property subject to partition.⁶¹ Other states' experiences on this point may provide useful models.⁶²

⁶⁰ NC Gen. Stat. § 46-5 provides as follows: *Petition by judgment creditor of cotenant; assignment of homestead*

When any person owns a judgment duly docketed in the superior court of a county wherein the judgment debtor owns an undivided interest in fee in land as a tenant in common, or joint tenant, and the judgment creditor desires to lay off the homestead of the judgment debtor in the land and sell the excess, if any, to satisfy his judgment, the judgment creditor may institute before the clerk of the court of the county wherein the land lies a special proceeding for partition of the land between the tenants in common, making the judgment debtor, the other tenants in common and all other interested persons parties to the proceeding by summons. The proceeding shall then be in all other respects conducted as other special proceedings for the partition of land between tenants in common. Upon the actual partition of the land the judgment creditor may sue out execution on his judgment, as allowed by law, and have the homestead of the judgment debtor allotted to him and sell the excess, as in other cases where the homestead is allotted under execution. The remedy provided for in this section shall not deprive the judgment creditor of any other remedy in law or in equity which he may have for the enforcement of his judgment lien.

See also *Edmonds v. Wood*, 22 S.E.2d 237 (NC 1942) (recognizing that judgment lien is subordinate to right of cotenants to enforce partition; when partition is made, judgment lien is transferred to portion of debtor then held in severalty).

⁶¹ When asked for suggestions for partition reform, one North Carolina attorney wrote:

We really need some mechanism under state law to sell property free and clear of judgment liens, with the liens attaching to the proceeds, similar to Section 363 of the bankruptcy code. I am not aware of any current method to remove a judgment lien in a partition proceeding and the existence of the judgment lien can make partition impossible." You can notify the judgment lien creditor under Whitehurst [v. Hinton, 209 N.C. 392 (NC. 1936)] which held (roughly) that if you did not notify them, they were not cut off. But there is no affirmative statement in the statutes that is sufficient to affirmatively shift the lien to proceeds, especially if the lien far exceeds the debtor-cotenant's share and net of partition costs and fees. This should include addressing U.S. and IRS liens, to the extent possible under a state law."

⁶² For discussion of case law from other states, 2 TIFFANY ON REAL PROPERTY § 482 (3rd edition) (as to involuntary partition, "since partition effects no change in title, a mortgage or other lien upon an undivided share is transferred, upon the partition, to the portion allotted to the owner of such share, otherwise a cotenant might defeat the right of effectual partition by placing an incumbrance upon his interest at any time before the execution of the decree in partition.") (footnotes omitted); *id.* at § 471 (as to voluntary partition, "The prevailing view, as to the transfer in such case of the lien or mortgage to the portion allotted in severalty, in place of the undivided interest originally subject, might, it seems, be supported on the theory that the right of partition, in connection with property held in cotenancy, is such an integral characteristic of the holding that it cannot be affected by the creation of an incumbrance on a cotenant's undivided interest"; "A mortgage by a cotenant upon an undivided share in part only of the tract is not, it seems, upon partition, to be extended to land outside of such part, merely because it is included in the allotment to the mortgagor. But it has apparently been decided that if a cotenant mortgages his undivided share in the whole, and then acquires another undivided share, upon partition the mortgage extends to the whole part allotted to him.") (footnotes omitted).

For a discussion of the intersection of federal tax liens and partition law, see 6-50 DEBTOR-CREDITOR LAW § 50.06 [b][ii] :

A federal tax lien arising against an owner of property held in joint or common tenancy will attach to that person's share of the joint or common tenancy property. The real question is how the

B. Fairness.

1. *Meaning.* Fairness is inevitably a complex topic. There is little doubt that the 2009 debate about partition reform in North Carolina reflected conflicting views about fairness. In all good faith, members of the real estate bar expressed the view that it was essential for tenants in common to retain an absolute right to dissolve and sever their shared interests. On the other hand, those most knowledgeable about the challenges facing minority families whose lands were increasingly being lost to development interests believed in good faith that it was unfair for a developer to seek out a distant relative and use that relative's interest in selling his or her interest to dissolve the family farm through a forced sale, with interested parties securing rights at under market rates.

Similar debates have played out nationally. In particular, these debates have suggested that certain types of property might appropriately be treated as “identity property,”⁶³ that is, real estate whose owners conceive of their property rights as integrally related to their personal identities and family histories (not only “heirs property” as defined above but also other properties with family histories such as beach cottages and hunting cabins).⁶⁴ In such instances, property conceptions tend to depart from the “law and economics” framework in which all property is seen as subject to “rational economic actor” decision-making. Where personal sentimentality and history have a bearing on how property interests are understood, the law may need to embrace frameworks that consider such personal and family dynamics, notwithstanding the fact that other “rational economic actors” such as developers would prefer to assert freedom from such complex concerns. In another respect, even those who represent and support minority property owners have begun to focus not so much on “personal identity” property but on “vulnerable” property-owners. Given these divergent viewpoints, it is especially important to consider what policy concerns related to fairness should really drive partition law reform.

As was true with the definition of “efficiency” concerns, not all commentators necessarily share the same perspective about the meaning of “fairness.” Some thoughtful observers use a different approach to defining “fairness,” and frame that concern in terms

government's lien on that property may be enforced. Because partition and sale of the delinquent taxpayer's share will often garner a low sale price, the government has long sought authority to sell the entire property, including the shares of the other tenants, thereafter turning over to the other tenants all proceeds except the share of the proceeds allocable to the taxpayer. The other tenants, understandably, objected on due process as well as other grounds. After one case denying the government that procedure, however, courts have uniformly held that the government has that authority. An occasional exception to that rule occurs when the jointly owned property is also homestead property. In a few states, homestead rights are viewed as property rights and not simply as exemptions from levy. In those states, the homestead property may not be seized and sold by the government to satisfy one spouse's tax debt. (footnotes omitted).

⁶³ See articles cited at notes 64, 70, and 80, *infra*.

⁶⁴ See Sarah E. Waldeck, *Rethinking the Intersection of Inheritance and the Law of Tenancy in Common*, 87 NOTRE DAME L. REV. 738, 744-49 (2011) (discussion of “family cottages”); Lisa C. Willcox, *You Can't Choose Your Family, But You Should Choose Your Co-Tenants: Reforming the UPC to Benefit the Modest-Means Family Cabin Owner*, 87 U. COLO. L. REV. 307 (2016)

of “vulnerability.”⁶⁵ Professor Jesse Richardson of the West Virginia University College of Law, defines “vulnerability” as “the fear of being forcibly disposed of land.”⁶⁶ Professor Richardson’s approach certainly focuses tightly on one of the worst results of a system that is “unfair,” insofar as it does not give due recognition to the concerns of all property owners including those living on family-owned property (often falling within the definition of “heirs property”). This article does not adopt Professor Richardson’s approach because, in the author’s view, “fairness” and “unfairness” encompasses more than “vulnerability.” Instead, in this author’s view, a more encompassing set of concerns relating to fairness needs to be considered including, among other things: the possibility that current law embodies a preference for development rather than retention of farm or family land rather than proceeding more neutrally; the potential that the law privileges economic value rather than valuation of land tied to personal identity; and the possibility that even as among concurrent tenants there is some inequity in treatment of expenditures and expectations. “Vulnerability” is certainly a concern, but not the only one.

Attorneys involved in partition matters also need to consider fairness by looking in the mirror and considering appearances as well as realities. There is a perception (whether or not warranted) in some quarters that attorneys involved in partition transactions may feather their own nests by serving as partition commissioners and handling sales on the courthouse steps at less than fair market value. If lawyers are prepared to hold themselves accountable for fairness in partition proceedings, they may need to agree to reforms that would take them out of these apparently compromised situations. Instead attorneys would need to be open to use of independent appraisers rather than attorney-commissioners in valuing property, and would disqualify themselves from being involved in partition sales of property or representing those who wish to purchase such property.

Ultimately, concerns for fairness need to take into account at least the following concerns: (a) differential circumstances and populations (whether based on “personal identity” or “vulnerability”) that may dictate that partition of certain types of property should be treated differentially from partition in the context of commercially-derived concurrent interests; (b) perceptions of differential power or resources that might have the effect of skewing decisions regarding partition; and (c) procedural concerns relating to attorneys whose roles might potentially give rise to an appearance or reality of lack of impartiality or risk of self-dealing.

2. *Implications for Reform: Emerging Trends Related to Fairness.*

a. Involuntary Partition: Identity Property: Uniform Partition of Heirs Property Act and Other Special Circumstances. Perhaps the most significant recent national development regarding partition law concerns the Uniform Partition of Heirs Property Act.⁶⁷ The specifics of this legislation are addressed below.⁶⁸ This legislation is rooted in a recognition that not all concurrent ownership or all partition actions are the

⁶⁵ See Richardson, *supra* note 43, 45 REAL EST. L. J. at 507.

⁶⁶ *Id.*

⁶⁷ See Part III *supra* (discussion of Uniform Partition of Heirs Property Act).

⁶⁸ See *id.*

same. Instead, hearkening back to the early history of partition,⁶⁹ “family land” arising at the intersection of the law of wills/intestacy and concurrent ownership is potentially different, because of the distinctive expectations at work. Professor Thomas Mitchell and others have paved the way in asking how “heirs property” (that is, property arising through wills and intestacy and owned in substantial part by extended family members) might be different.⁷⁰ Other thought-provoking recent scholarship has posed questions about property (such as beach houses or hunting cabins)⁷¹ that reflects personal and family identity and may accordingly require more nuanced estate planning or statutory treatment. Potential partition reform in North Carolina offers an opportunity to address related concerns.

b. Involuntary Partition: Courthouse Auctions versus Market-Based Valuation. There is significant evidence that sales on the courthouse steps do not yield meaningful, accurate values for real estate.⁷² Often there are single bidders who offer very low bids that do not accurately reflect the true value of the property.⁷³ Although the current partition system allows co-tenants to contest property values set by courthouse auctions, this system does not make it easy to correct misjudgments in ultimate value.⁷⁴ A fair system would embody a more functional approach that reflects fair market values at the outset, rather than relying on subsequent challenges to set matters right. A fairer system might incorporate more explicit criteria for valuation and more systematic use of expert real estate appraisers rather than the tradition of “commissioners” who may lack such systematic expertise.

⁶⁹ See note 7-9, *supra*, and accompanying text (relating to coparceny).

⁷⁰ See Thomas W. Mitchell, *Destablizing the Normalization of Rural Black Land Loss: A Critical Role for Legal Empiricism*, 2005 WIS. L. REV. 557 (2005) (discussing black rural property acquisition and land loss since the Civil War, particularly toward the end of the 20th century; highlighting need for empirical research; critiquing law and economics articles; reviewing available data and author’s work sponsored by Ford Foundation; describing field work in Halifax County, North Carolina and initial findings); Thomas W. Mitchell, Stephen Malpezzi, & Richard K. Green, *Forced Sale Risk: Class, Race, and the “Double Discount*, 37 FLA. ST. U. L. REV. 589 (2010) (critiquing economic arguments claiming that certain types of forced sales result in wealth-maximizing, economic efficiencies; considering distinction between sales conducted under fair market value conditions and sales conducted under forced sale conditions and arguing that sales conducted under forced sale conditions rarely yield market value prices; concluding that those who are wealthier are more likely to own property under more stable ownership structures or otherwise to avoid forced sales, particularly in contrast to minority property owners) (hereinafter Mitchell et al, *Forced Sale Risk*); Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505 (2001) (early consideration of heirs property and partition issues) (hereinafter referred to as Mitchell, *Reconstruction*); Thomas W. Mitchell, *Reforming Property Law to Address Devastating Land Loss*, 66 ALA. L. REV. 1 (2014) (review of Uniform Partition of Heirs Property Act and related issues) (hereinafter Mitchell, *Reforming*); Faith Rivers, *Inequity in Equity: The Tragedy of Tenancy in Common for Heirs’ Property Owners Facing Partition Inequity*, 17 TEMP. POL. & CIV. RTS. L. REV. 1 (2007) (considering heirs property issues); Phylliss Craig-Taylor, *Through a Colored Looking Glass: A View of Judicial Partition, Family Land Loss, and Rule Setting*, 78 WASH. U. L.Q. 737 (2000) (considering heirs property issues)

⁷¹ See note 64, *supra*.

⁷² See Mitchell et al., *Forced Sale Risk*, *supra* note 70, at 576-609.

⁷³ *Id.* at 606-609.

⁷⁴ See N.C. Gen. Stat. § 46-28.1. (petition for revocation of confirmation order).

c. *Involuntary Partition and Fair Procedure: The Role of Attorneys and Attorneys Fees.*

i. *Disinterest: Statutory and Ethical Norms.* North Carolina's partition statutes call for appointed commissioners to be "disinterested."⁷⁵ What does that mean?

(1) *2011 Formal Ethics Opinion Re Attorneys in Partition Proceedings and Its Implications.* Although existing statutes do not give much guidance on how that standard should be applied, North Carolina Formal Ethics Opinion 2009-8, *Service as Commissioner After Representing Party to Partition Proceeding* (adopted January 21, 2011), provides considerable guidance on related points.

This opinion addresses several related questions, taking into account governing rules on conflicts of interest, withdrawal, the ethical duty to provide independent professional judgment, and obligations based on prior representations. It reached the following conclusions:

- (1) An attorney representing a party in a partition proceeding to determine whether property is to be partitioned in kind or by sale may not also serve as the representative of unknown parties, given the existence of a potential conflict of interest and the inability of an absent party to give consent.
- (2) An attorney can serve as a commissioner in connection with the public sale of property (and receive a commission) if the clerk has determined that the property should be partitioned by sale, the attorney concludes he or she can serve fairly and impartially as a fiduciary for all parties, the attorney has advised his or her client in the partition proceeding of this possibility, and, once the sale has been ordered by the clerk, the client has consented in writing to allow the attorney to withdraw.
- (3) An attorney can agree to serve as the person appointed to conduct a private sale of property under the same circumstances as govern involvement as a commissioner in a public sale.
- (4) An attorney may not purchase property on his or her own account when he serves as commissioner for a public sale or the person appointed to conduct a private sale.
- (5) If someone else serves as the commissioner to sell property in a public sale, an attorney who represents a party in the partition proceeding may not bid on the property for his or her own account but may do so on behalf of his or her client.
- (6) If the clerk ordered the property to be partitioned in kind, an attorney who had been involved in the prior stage of the action may not serve as a commissioner charged with dividing the property.
- (7) However, it would be permissible for an attorney to serve as a commissioner in a sale of property or in a division in kind of property, if the attorney concludes that he or she

⁷⁵ See N.C. Gen. Stat. § 46-7. Commissioners appointed.

The superior court shall appoint three disinterested commissioners to divide and apportion such real estate, or so much thereof as the court may deem best, among the several tenants in common, or joint tenants. Provided, in cases where the land to be partitioned lies in more than one county, then the court may appoint such additional commissioners as it may deem necessary from counties where the land lies other than the county where the proceedings are instituted.

can be impartial, even though he or she had been involved in a distinct but separate earlier partition action (for example a proceeding that did not involve partition or sale of the same property).

- (8) Likewise, a “disinterested” attorney who does not represent a party in a current partition proceeding but was involved in a related, distinct and separate prior proceeding, could represent an unknown party in the current proceeding if appointed by the court.
- (9) Moreover, an attorney who represented a party in an unrelated prior proceeding, but does not represent a party in the current partition action could purchase property in the current partition action so long as he or she did not receive confidential information that could be used to the detriment of a prior client in bidding on the property currently.

(2) *Ethics Opinion and Legislative Recommendations.* This Formal Ethics Opinion provides significant formal guidance for attorneys involved in partition actions, something that was lacking at the time of the 2008-2009 legislative consideration of possible partition reform. As noted above, the Study Committee on partition reform at that time had made several related proposals including the following:

- *Impartiality of Attorney Commissioners: Comparison.* The committee proposed that attorneys who currently represented parties in a partition proceeding or had previously represented parties in a related partition proceeding be found not to be disinterested potential commissioners in partition proceedings unless all parties consented. The Ethics Opinion reaches a similar conclusion as to attorneys currently representing parties in a particular proceeding, but allows participation if the attorney concludes that he or she can be impartial and if the client allows withdrawal. The Ethics Opinion is less limiting with regard to involvement in prior related proceedings provided the attorney does not use confidential information derived in the earlier representation and concludes that he or she can be impartial.
- *Ineligible Sellers: Comparison.* The study committee recommended in 2009 and the General Assembly adopted an amendment to NC Gen. Stat. § 46-31 that prohibited the clerk of superior court (assistant clerk or deputy clerk) from selling or being appointed to sell land in a public partition sale if there had been a proceeding before that clerk. The committee had also recommended that attorneys who currently represented a party in the pending partition proceeding or had previously represented parties in a related partition proceeding be barred as sellers, but that proposal was not adopted. The Ethics Opinion limits the opportunity for an attorney to serve as commissioner for a public sale, or the appointed representative for a private sale if the attorney has been involved in the underlying partition action, unless the attorney concludes that he or she can be impartial and unless the attorney’s client agrees to allow the attorney to withdraw. An attorney would not be barred from such involvement if he or she had been involved in a related but distinct prior partition proceeding.

- *Ineligible Purchasers: Comparison.* A new NC Gen. Stat. § 46-31.1 provision was proposed by the Study Committee in 2009. This provision would have prohibited attorneys (or attorneys' agents) who currently represent a party in a partition proceeding or who represented a party in a related proceeding from purchasing property sold in connection with a partition sale. Commissioners and their agents and appraisers or their agents would also have been barred. Although this proposal was not adopted, the Ethics Opinion limits circumstances in which an attorney can bid on their own behalf in connection with a public partition sale. An attorney may not bid in a sale to purchase partition property when either the attorney or someone else serves as the commissioner or representative to conduct the sale. However, an attorney who represents a party in a given partition proceeding may bid as an agent of that party. An attorney may bid on property that was subject to a related prior proceeding in which he or she represented a party, but only if the attorney did not have access to confidential information from that representation that could be used to disadvantage the prior client in the current proceeding.

For purposes of current deliberations on partition reform, several questions are worth considering. Is the guidance provided by the 2011 Ethics Opinion sufficient to assure that attorneys proceed with care in the context of partition actions, so as to avoid conflicts and lack of impartiality? Should legislation be adopted that embodies key provisions of the Ethics Opinion so that expectations of attorneys are better understood by members of the public, clients, attorneys and judges? Should broader prohibitions against attorney involvement be adopted legislatively in order to assure the public that attorneys must avoid even the appearance of unfairness and to remove from individual attorneys the temptation to believe that they are impartial when in fact they may not be? These are important questions worth consideration by the real estate bar, the General Statutes Commission, and the General Assembly.

ii. *Attorneys' Fees Provisions: Deterrent or Encouragement?*

North Carolina's current partition statutes were amended in 2009 to address attorney's fees. Written notice must now be included in a summons in a partition action that makes the respondents aware of the following: "pursuant to G.S. 6-21 the court has the authority, in its discretion, to order reasonable attorneys' fees to be paid as a part of the costs of the proceeding." NC Gen. Stat. § 46-3.1(b)(2). Section 6-21 reads in pertinent part:

Costs allowed either party or apportioned in discretion of court. Costs in the following matters shall be taxed against either party, or apportioned among the parties, in the discretion of the court... (7) All costs and expenses incurred in special proceedings for the division or sale of either real estate or personal property under the Chapter entitled Partition.... The word "costs" as the same appears and is used in this section shall be construed to include reasonable attorneys' fees in such amounts as the court shall in its discretion determine...."

North Carolina statutes currently leave the allocation of attorney's fees to the court's discretion without providing a great deal of guidance. They do not, as the 2009 study committee suggested, prohibit an award of attorneys' fees against a non-petitioning

cotenant who contests the partition or sale of the property by appearing in person before the court.”

A number of other states have provided additional guidance without going as far to favor parties opposing partition as the 2009 proposal would have done. For example, South Carolina, through its rules of civil procedure limits the amount of attorney’s fees that can be levied on all participants in a partition action to a proportionate share of work done for the “common benefit.”⁷⁶ Ohio allows for payment of attorneys’ fees relating to work for the common benefit by statute, as do Montana and Arkansas.⁷⁷

In order to determine the fairest approach to allocation of attorney’s fees, and to take into account related incentives, it seems important to recognize that setting up a winner-loser regimen between contending parties is likely to make it harder for parties with more limited resources to present their claims and seek justice as a result. Some states, such as South Carolina, have dedicated nonprofit resources available to help those seeking to sort out property rights at least among those with “heirs property.”⁷⁸ Parties investing in property for commercial purposes can readily address such matters in “co-tenant agreements.”⁷⁹ In the interest of both efficiency and fairness, it would seem that the public would be best served if incentives to bury competing parties by driving up

⁷⁶ See South Carolina Rule of Civil Procedure 71(d) (3) *Attorneys Fees and Costs*. Attorneys fees and costs may be awarded the attorney for any party(s) from any common fund generated by the partition to the extent that attorney’s efforts benefited all parties; otherwise, his fee shall be paid by the party(s) he represents or from the party(s) share(s) only. The court may order the payment of costs from the proceeds of sale of the common property or may equitably assess the costs against shares of the parties. *See also* Cal. Code of Civil Procedure § 874.010, Inclusions. The costs of partition include: (a) Reasonable attorney’s fees incurred or paid by a party for the common benefit.”

⁷⁷ See Ohio R.C. § 5307.25. (“*Costs and expenses to be equitably taxed*. Having regard to the interest of the parties, the benefit each may derive from a partition, and according to equity, the court of common pleas shall tax the costs and expenses which accrue in the action, including reasonable counsel fees, which must be paid to plaintiff’s counsel unless the court awards some part thereof to other counsel for services in the case for the *common benefit of all the parties*; and execution may issue therefor as in other cases”); Montana Code 70-29-218 (“Costs of partition—apportionment among parties—lien,” calling for apportionment of “the costs of partition, including reasonable counsel fees, expended by the plaintiff or either of the defendants for the common benefit”).

Arkansas Code § 18-60-419 (“Payment of attorney’s fees”) (using “common benefit” standard, stating that no party shall be assessed services which benefit only one party, and capping fees that can be awarded at \$40,000).

⁷⁸ See Center for Heirs Property Protection, <http://www.heirsproperty.org/> For additional discussion of issues facing South Carolina, see Faith Rivers, *Restoring the Bundle of Rights: Preserving Heirs’ Property in Coastal South Carolina*, http://www.americanbar.org/content/dam/aba/events/real_property_trust_estate/symposia/2006/12_property_preservation.authcheckdam.pdf (symposium on heirs property issues).

⁷⁹ For an example of an agreement between tenants in common provided by the American Bar Association’s Real Property Section in 2012, see http://www.americanbar.org/content/dam/aba/events/real_property_trust_estate/step/2012/materials/rpte_step_2012_07_09_Dietrich_11_Tenancy_Common_Agreement_11.authcheckdam.pdf (including recitals, an automatically renewable term of one year, subject to termination by all parties, provisions relating to management, operating capital and expenses, right of first refusal before partition or sale to third party, notice, dispute resolution and associated fees, choice of law, and confirmation that partnership relationship is not intended) (this model appears suitable for parties holding property as tenants in common for purposes of investment, and is not narrowly tailored to situations involving “heirs property.”)

attorneys' fees and costs were resisted. A good case can therefore be made that North Carolina partition law should be revised to create more constructive incentives for dispute resolution in partition cases, perhaps by adjusting the current regime regarding attorneys' fees and costs.

III. Proposals for Change: Uniform Partition of Heirs Property Act

A. *History.*

Professor Thomas Mitchell, Reporter for the Uniform Law Commission's Drafting Committee that endorsed the Uniform Act, has provided a helpful historical summary of growing attention given to the problem of "heirs property" over the last 30 years.⁸⁰ As Professor Mitchell explains, problems associated with "heirs property" flew below the radar of most private real estate practitioners for many years, until a growing number of public interest lawyers, advocates, and professors began to raise awareness about problems associated with resulting land loss. These problems go beyond the general issues associated with partition among tenants in common, because they are so rooted in generations-long issues of poverty, unease or limited access to lawyers and dispersal of family members with rights to "heirs property."⁸¹ Many of those in this situation have been individuals with limited means, members of minority communities, and parties with limited access to or trust of lawyers for purposes of estate planning.

According to Professor Mitchell, instead of comprehensive reform, a very small number of states enacted into law some discrete reforms over the past few decades action to address associated problems.⁸² These reforms were designed to stabilize tenancy-in-common ownership in some small ways or to make the economic impact of partition sales fairer, on the margins, to cotenants who tried unsuccessfully to resist court-ordered partition sales. These jurisdictions included Arkansas (which adopted a statute in 1985 to discourage speculators from purchasing small undivided interests in property held in tenancy in common). Professor Mitchell also cited legislative efforts in North Carolina, where the legislature approved minor reforms to partition law in 2009, including a requirement that those petitioning for partition notify respondents that the respondent may

⁸⁰ See Thomas Mitchell, *Reforming*, *supra* note 70, at 36-41. Strikingly, two leading property professors currently teaching at North Carolina law schools were involved in developing the scholarly foundation for the Uniform Act and in advising about its development. See Phyllis Craig-Taylor, Phyllis Craig-Taylor, *Through a Colored Looking Glass: A View of Judicial Partition, Family Land Loss, and Rule Setting*, 78 WASH U. L.Q. 737 (2000) (Dean and Professor of Law at North Carolina Central School of Law); Faith Rivers James, *Inequity in Equity: The Tragedy of Tenancy in Common for Heirs' Property Owners Facing Partition in Equity*, 17 TEMP. POL. & CIV. RTS. L. REV. 1, 58 (2007) (associate dean at Elon University Law School).

⁸¹ Professor Mitchell published a seminal article in 2001. See Thomas Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence and Community Through Partition Sales of Tenancies in Common*, 95 NW U. L. REV. 505 (2001) (hereinafter referred to as Mitchell, *Reconstruction*). His work built on earlier work by others including the following: THE EMERGENCY LAND FUND, INC., *THE IMPACT OF HEIR PROPERTY ON BLACK RURAL LAND TENURE IN THE SOUTHEASTERN REGION OF THE UNITED STATES* (1980).; Chris Kelley, *Stemming the Loss of Black Owned Farmland Through Partition Action: A Partial Solution*, 1985 ARK. L. NOTES 35; Harold A. McDougall, *Black Landowners Beware: A Proposal for Statutory Reform*, 9 N.Y.U. REV. L. & SOC. CHANGE 127 (1979-1980).

⁸² Mitchell, *Reforming*, *supra* note 70 at 38-39.

be able to secure free legal services, an extension of the deadline for commissioners to submit their reports specifying how property should be divided in kind; and enhanced mediation provisions.

During this period of reflection on how best to address “heirs property” issues through national models, the American Bar Association’s Section of Real Property, Trust and Estate Law (RPTE), through its Property Preservation Task Force, played a major role in ultimately convincing the Uniform Law Commission to form a committee to draft a uniform act that would address concerns that tenancy-in-common property owners have had with partition law as that law affected land loss.⁸³ The committee began its work in 2007 and the Uniform Act was promulgated in 2010.

The Prefatory Note accompanying the Uniform Act cited the following problems as raising particular concerns that the drafting committee sought to address. These concerns included the following.⁸⁴

- Individual cotenants could readily sell their interests to real estate speculators who in turn could force partition of family property, or could transfer their interests at death in ways that created further fragmentation of property interests.
- Parties recently acquiring cotenant interests could force partition against the wishes of family members as to property that had long been held in families.
- Family-held property could be partitioned by sale of the property as a whole, rather than partitioned in kind.
- Despite purported preferences for partition in kind, many courts instead resolved disputes by partition by sale.
- Many states employed partition by sale procedures that relied on auctions yielding below fair market price.
- Co-tenants resisting claims for partition by sale were commonly required to contribute to attorney’s fees for those co-tenants seeking partition.
- Partition by sale mechanisms often allow speculators to purchase concurrently owned property at below fair market value through court-directed auctions.

The Prefatory Note also cited the growing evidence of particular problems facing African-American, Hispanic, Native American, rural and urban communities who were dealing with “heirs property” issues in various ways.⁸⁵ The Note cited the following examples of problems faced by “select communities”:⁸⁶

- [A]lthough African-Americans acquired between sixteen and nineteen million acres of agricultural land between the end of the Civil War and 1920, African-Americans retain ownership of approximately just seven million acres of agricultural land today.

⁸³ See Thomas Mitchell, *Reforming*, *supra* note 70, at 36-41. For a copy of the preliminary report of the ABA Real Property Section’s Property Preservation Task Force, see http://www.americanbar.org/content/dam/aba/events/real_property_trust_estate/symposia/2006/12_property_preservation.authcheckdam.pdf (at 621-33).

⁸⁴ Uniform Act, Prefatory Note at 1-2.

⁸⁵ Uniform Act, Prefatory Note at 4-7.

⁸⁶ *Id.* at 4-7 (footnotes omitted)

Scholars and advocates who have analyzed patterns of landownership within the African-American community agree that partition sales of heirs property have been one of the leading causes of involuntary land loss within the African-American community....

- [F]orced partition sales have negatively impacted other communities as well, especially other low-income and low-wealth communities. For example, Mexican-Americans lost hundreds of thousands of acres of land in New Mexico and other states after a significant amount of their community-owned property was improperly classified as tenancy-in-common property and was then ordered sold under partition sales in the aftermath of the Mexican-American War....
- [I]n parts of Appalachia, heirs property has been hypothesized to be correlated with, and a cause of, the persistence of poverty. Case studies suggest that heirs property owners in Appalachia are often concerned that one of their fellow cotenants might sell his or her interest to a wealthy buyer who will request a court to order the property partitioned by sale and then will purchase the property at the auction.
- Some American Indians also have had their family property sold against their will at partition sales....
- Heirs property ownership has presented vexing problems to property owners in cities such as New Orleans [particularly in the aftermath of Hurricane Katrina.] A significant percentage of these poor property owners owned heirs property, which created merchantable title problems which needed to be resolved before the property owners could qualify for the governmental programs....
- [A] surprising number of property owners who are not poor or minority also experience significant problems with heirs property ownership. In Maine, for example, heirs property is commonly referred to as “heir-locked property.” Those who own such property in Maine experience many of the same problems that those who own heirs property elsewhere experience, including problems with unstable ownership. This has occurred in part because many properties that were not considered economically valuable in Maine fifty or sixty years ago increasingly lie in the path of development and because the ownership of many of these properties has become more fragmented with the passage of time as many interests in such property have been transferred by intestacy. Those who own heirs property in Maine also are often unable to manage their property in a rational way because some passive or uncooperative cotenants either do not contribute their share of the expenses needed to maintain ownership of the property or refuse to give their needed consent to plans that their more active fellow cotenants formulate to improve the management, stability, and utilization of the property. ...

A growing number of states have agreed with these concerns.⁸⁷

B. Core Provisions of Uniform Partition of Heirs Property Act (UPHPA or “Uniform Act”)

Four major policy elements shape the overall scope and structure of the UPHPA: (1) the definition of “heirs property” (the only property to which the Uniform Act applies); (2) the approach employed in making decisions regarding partition in-kind or partition by sale; (3) the use of a “buy out” rather than “sell all” strategy; and (4) procedural protections. Each of these elements is discussed below.

1. Role and Definition of “Heirs Property.”

The notion of “heirs property” plays a crucial role in the Uniform Act. A court must initially determine that the property proposed for partition falls within the definition of “heirs property” or the Uniform Act does not apply. Instead the state’s generally applicable partition statutes would govern.⁸⁸

Section 2(1) of the Uniform Act defines “heirs property” with great specificity as follows:

- (1) “Heirs property” means real property held in tenancy in common which satisfies all of the following requirements as of the filing of a partition action:
 - (A) there is no agreement in a record binding all the cotenants which governs the partition of the property;
 - (B) one or more of the cotenants acquired title from a relative,⁸⁹ whether living or deceased; and

⁸⁷ See note 37 *supra*, listing states that have adopted the Uniform Act.

⁸⁸ See Uniform Act section 3(b): “In an action to partition real property under [insert reference to general partition statute] the court shall determine whether the property is heirs property. If the court determines that the property is heirs property, the property must be partitioned under this [act] unless all of the cotenants otherwise agree in a record.” Two comments are provided as to Section 3(b):

1. A final order of a court in a partition action filed on or after the date this Act becomes effective is subject to challenge if the court failed to determine whether the real property in question is heirs property as that term is defined under this Act.

2. In a partition action, after a court has determined that the property in question is heirs property, all of the cotenants may agree to partition the property utilizing an agreed upon method or procedure that is different from the procedures required by this Act provided that the agreement is contained in a record.

⁸⁹ Relative is defined as follows:

(9) “Relative” means an ascendant, descendant, or collateral or an individual otherwise related to another individual by blood, marriage, adoption, or law of this state other than this [act].

The following related definitions also apply:

(1) “Ascendant” means an individual who precedes another individual in lineage, in the direct line of ascent from the other individual.

(2) “Collateral” means an individual who is related to another individual under the law of intestate succession of this state but who is not the other individual’s ascendant or descendant.

(3) “Descendant” means an individual who follows another individual in lineage, in the direct line of descent from the other individual.

- (C) Any of the following applies:
- (i) 20 percent or more of the interests are held by cotenants who are relatives;
 - (ii) 20 percent or more of the interests are held by an individual who acquired title from a relative, whether living or deceased; or
 - (iii) 20 percent or more of the cotenants are relatives.

It is thus clear that the Uniform Act is not intended to replace all of a state's partition laws, but instead is designed to establish a special regime applicable in a narrow set of circumstances involving land held in families as tenants in common. Thus, for the act to apply:

- *Family Source:* The title held by one or more co-tenants must have been acquired from a defined "relative" (whether living or dead).⁹⁰
- *Family Nexus:* 20 percent or more of the *interests* must be *held by relatives* (collaterals, ascendants, descendants, or those related by blood, marriage, or adoption); 20 percent of the *interests* are *held by an individual* who acquired title from a defined *relative* or (c) 20 percent or more of the cotenants must be relatives.
- *No Opt Out.* The co-tenants have not entered into a binding agreement to govern partition.

Consider some examples.

- The Uniform Act would apply if a family farm passed intestate or by will to four children who did not then enter into a binding agreement in a "record" for some other approach to partition. Commentary specifies that a will does not itself count as a record because it is not created as an agreement among the co-tenants.⁹¹ They four children received the property from a relative and each held a $\frac{1}{4}$ interest as tenants in common (more than 20%). As explained below, if one child

⁹⁰ Note that the Uniform Act does not apply to partition of property held as joint tenants. Comment 3 to Section 2(5) states:

Joint tenancy property is not covered by this Act. In order for any real property that was initially owned by two or more individuals as joint tenancy property to be covered by this Act, one or more of the joint tenants must sever the joint tenancy in accordance with the requirements of state law. Once a joint tenancy is severed, this Act may apply if the property is determined to be heirs property at the time of the filing of a partition action even if two or more individuals who had formerly been joint tenants prior to severance of the joint tenancy remain joint tenants with each other after severance with respect to a particular interest in the tenancy in common.

⁹¹ Comments to the Uniform Act confirm that a will does not constitute a "record" for purposes of opting out of the act. See Comment 4 to Section 2. ("If tenants in common acquire their interests through a deed or a will that does not govern the manner in which the tenancy-in-common property may be partitioned, the deed or will alone shall not be construed to be an agreement in a record among all the tenants in common which governs the partition of the property within the meaning of Section 2(5)(A).")

wanted to cash out his or her share of the property, one or more of the others could opt to purchase that $\frac{1}{4}$ share at a fair market value before it could be opened up to public sale to others.⁹²

- The Uniform Act would not apply to beach property purchased by two married couples (A and B, and C and D). Absent explicit language to the contrary, each couple together holds their shares as between themselves as tenants by the entirety, but has a $\frac{1}{2}$ undivided interest as tenants in common as to the other couple. The Uniform Act would not apply since the property was not acquired from a relative. Moreover, good practice would be for the couples to enter into a co-tenant agreement addressing future disposition. If they were on good terms, they would likely include a provision to allow each couple to buy out the other in the event of a desire to cash out.
- Assume that A dies. B would then own a $\frac{1}{2}$ interest as a tenant in common with C and D (who would continue to hold together as tenants by the entireties). Arguably, the Uniform Act would still not apply, because B's interest was not taken from a relative, but rather arose by operation of law in the first instance since the original title in the entireties did not result in title by "descent."
- Assume that A died and B later died while C and D remained alive. B left a will that disposed of her share of the beach property equally to her four children (B1, B2, B3 and B4), who would then each have a $\frac{1}{8}$ interest as tenants in common as

⁹² Some of the related commentary to the Uniform Act is ambiguous. Comment 3, addressing section 2(5) (the definition of "heirs property") reads as follows:

Furthermore the Act does not apply to "first generation" tenancy-in-common property established under the default rules and still owned exclusively by the original cotenants even if there is no agreement in a record among the cotenants governing the partition of the property. "First generation" tenancy-in-common property, however, may be converted into heirs property if a cotenant with an interest in such "first generation" tenancy-in-common property transfers all or a part of his or her interest to a relative provided that the other criteria for classifying property as heirs property are satisfied.

The ambiguity arises because of the reference to "under the default rules," which is seemingly intended to refer to a situation in which siblings purchase land together and hold as tenants in common without inheriting or receiving land as a group from a forbearer. Professor Thomas Mitchell, who was the reporter for the Uniform Act, addresses this matter more clearly and confirms that reading. See Mitchell, *Reforming*, *supra* note 70:

Under these family ownership criteria, the UHPA would not apply to "first generation" tenancy-in-common properties first established *by volition by the current group of cotenants themselves under the default rules*, even if all of the cotenants are related and even if there is no agreement in a record governing the partition of the property.²⁰⁷

²⁰⁷ The decision that the UHPA would not apply to these type of tenancies in common was made because many members of the drafting committee, as well as the ULC's leadership, believed that there was a need to limit the scope of the Act, though other members believed that the reforms the UHPA makes to partition law should apply to a much broader subset of tenancy-in-common ownership. The drafting committee excluded "first generation" tenancies in common *that are not established by devise or intestate succession* from the definition of heirs property because most members of the drafting committee believed that the type of tenancy-in-common land loss that influenced the ULC to establish a drafting committee in the first instance occurred in cases in which there had been some transfer of interests in tenancy-in-common property among family members. (emphasis added).

between themselves and as between themselves and the other couple (C and D, who still hold as tenants by the entirety as to themselves). In this instance, the children received their shares from a relative (their mother, an “antecedent”). Twenty percent or more of the interests are held by co-tenants who are relatives (in this case, 50% of the interests are held by the children who are relatives), and 20% or more of the cotenants are relatives (that is, the children). Although 20 % of the interests are not held by an individual who acquired those interests from a relative, only one of the three “family nexus” tests must be met. Thus, before one of the children could force a partition by sale of the whole property so as to defeat the interests of her siblings or the other couple, the other siblings or the couple would have the option to buy out her 1/8 share using the simplified procedures discussed below.

- The Uniform Act would not apply to property purchased by two business partners as an investment in hopes of future development for a residential subdivision. The property would more likely be held by a business partnership or corporation and not as tenants in common. Even if held as tenants in common, it was not acquired from a relative. Moreover, co-tenant agreements are typically used with commercial purchases of this sort.

2. *Partition in Kind v. Partition by Sale: Criteria and Options*

The Uniform Act includes standard definitions of partition in kind⁹³ and partition by sale,⁹⁴ but in other respects modifies the calculus of when partition in kind and partition by sale should be employed. There are two principal ways in which the options available for partition of “heirs property” differs from the options available in other settings: (a) a broadened range of criteria are to be used to determine whether partition in kind or partition by sale should be employed and (b) a new principal option (co-tenant buyout) is added to the choices available when partition is sought. It should be emphasized, once again, that these options and criteria apply only as to partition of defined “heirs property,” not to other types of property (for example, property purchased as a commercial investment).

a. *Criteria for Choosing Partition in Kind or Partition by Sale.* In Section 9, the Uniform Act incorporates modern case law developments from several jurisdictions that have concluded that, at least where “identity property” such as “heirs property” is concerned, both objective economic factors *and* other more subjective factors affecting the value of property in human terms (such as sentimental, relational, historical, and personal considerations) should be taken into account in determining whether property should be partitioned in kind or by sale.⁹⁵ Bear in mind that the use of this broadened

⁹³ “Partition in kind” means the division of heirs property into physically distinct and separately titled parcels. Uniform Act Section 2(7).

⁹⁴ “Partition by sale” means a court-ordered sale of the entire heirs property, whether by auction, sealed bids, or open-market sale conducted under Section 10. Uniform Act Section 2(6).

⁹⁵ See cases cited by Uniform Law Report at section 9 comments, including *Delfino v. Vealencis*, 436 A.2d 27, 33 (Conn. 1980) (“It is the interests of all of the tenants in common that the court must consider; and not merely the economic gain of one tenant, or a group of tenants.”); *Schnell v. Schnell*, 346 N.W.2d 713,

range of factors *does not mandate* that they play into the actual valuation of property *in the event of a sale*, but rather reflects the view that such additional factors should play a role in what is in effect an equitable judgment by a court as to *whether property should be divided in kind or by sale*.

As noted above, the 2009 legislative study committee on partition had proposed adoption of a more expansive list of factors to be considered in determining whether partition in kind or partition by sale should apply.⁹⁶ Significantly, that proposed change was not limited in the ways that the Uniform Act is limited. It did not apply only to defined “heirs property” and might therefore have been perceived as applying to all types of partition (including partition of commercial rather than family property). It also did not include the significant caveat included in Section 9(b) of the Uniform Act: “The court may not consider any one factor in subsection (a) to be dispositive without weighing the totality of all relevant factors and circumstances.”

Thus, the Uniform Act would require consideration of traditional factors (such as whether division in kind is practicable, whether partition in kind would result in a materially lower aggregate property value compared to selling the property as a whole), but would also add factors that seem particularly relevant when considering that the property in question has a history within a family (including evidence of collective duration of ownership or possession, a cotenant’s sentimental attachment to the property including attachment arising from ancestral use, lawful use currently being made by a cotenant, and the degree to which cotenants have contributed their pro rata share of property taxes, insurance, and other expenses of maintenance or improvement of the property).⁹⁷

The introduction of these additional factors may seem problematic to some observers who have been used to the prior partition regime that basically gave priority to an economic analysis of value and promoted development by setting up a system that fostered sale of the full concurrently-owned parcel if one co-tenant wished to cash out and partition in kind was not feasible. It should be remembered, however, that these added factors are only to be applied within the context of “heirs property” (that is family land), and should not complicate decisions on partition in kind or by sale in other circumstances. Consideration of a full range of factors relevant to the particular character of land as held in families seems particularly appropriate in an equitable action for partition tailored very

716 (N.D. 1984) (holding that economic and noneconomic factors, including sentimental value, should be weighed by a court in a partition action); *Eli v. Eli*, 557 N.W.2d 405, 409-411 (S.D. 1997) (citations omitted) (in adopting a totality of the circumstances test, the Supreme Court of South Dakota stated that “[o]ne’s land possesses more than mere economic utility; it ‘means the full range of the benefit the parties may be expected to derive from their ownership of their respective shares.’ Such value must be weighed for its effect upon all parties involved, not just those advocating a sale.”); *Ark Land Co. v. Harper*, 599 S.E.2d. 754, 761 (W. Va. 2004) (“[I]n a partition proceeding in which a party opposes the sale of property, the economic value of the property is not the exclusive test for deciding whether to partition in kind or by sale. Evidence of longstanding ownership, coupled with sentimental or emotional interests in the property, may also be considered in deciding whether the interests of the party opposing the sale will be prejudiced by the property’s sale.”).

⁹⁶ See note 34 and accompanying text, *supra*.

⁹⁷ See Uniform Act section 9.

specifically to the characteristics of family land and the reasonable expectations of family members who own it. Significantly, once again, consideration of these factors relates *only* to the decision to partition in kind or by sale, and does not bear on the actual assessment and market value of the property if ultimately ordered to be sold.

b. Expanded Menu of Partition Options. Section 8 of the Uniform Act references the expanded array of options created by the Uniform Act for partitioning “heirs property.” As discussed below, the Uniform Act envisions a new primary “co-tenant buyout” option.⁹⁸ The Uniform Act also provides an option for tipping the balance further as between “in kind” and “by sale” partition options, offering alternative standards as to whether partition by sale should be selected if partition in kind will result in “great” or “manifest” “prejudice to the cotenants as a group.”⁹⁹

3. *Buy-Out Rather than Sell-All.*

Under North Carolina’s existing statutory scheme, if partition by sale (rather than partition in kind) is found appropriate, the property as a whole is sold and aliquot portions of the sales revenue distributed to co-tenants.¹⁰⁰ This “sell-all” approach has resulted in significant “land loss” to minority families and others with family farm property, since it effectively mandates that any co-tenant (or group of co-tenants) must come up with the full value of the property as a whole in order to retain an individual or shared interest with family members seeking to retain the property. The hurdle created by the existing system is high and arguably quite unfair. Why should those who already hold property as co-tenants have to raise the capital to purchase back their own interests in order to retain the property in the family, rather than simply buying out a fellow co-tenant who wants to cash out? This fundamental insight—that it is fair to require co-tenants to buy out each other or allow property to go to sale to others—is a crucial part of the Uniform Act. The provision speaks to fairness considerations because it seeks to allow those with a concurrent interest as to family property to be fairly compensated for their interest. At the same time, it does not allow a party in that situation to trigger a cascading catastrophe in which family land is lost to all family members unless they can raise the funds to buy out the party wishing to “cash out” and themselves as well.

Section 7 of the Uniform Act (relating to co-tenant buyout) is carefully conceived and framed. This section builds upon other provisions (discussed below) that call for the court to establish a baseline value for the property calibrated to fair market value using a fair market appraisal.¹⁰¹ The first step in the process is accordingly to determine the fair market value of the property, and the second step is to have the court give notice to all cotenants of that determination.¹⁰² Within 45 days thereafter, a cotenant may opt to buy out the interests of a co-tenant seeking sale of that co-tenant’s interests in the property

⁹⁸ See text at notes 100-104, *infra*.

⁹⁹ See Uniform Act Section 8.

¹⁰⁰ See N.C. Gen. Stat. § 46-33. Shares in proceeds to cotenants secured. (“At the time that the order of confirmation becomes final, the court shall secure to each tenant in common, or joint tenant, his ratable share in severalty of the proceeds of sale.”)

¹⁰¹ See text at notes 107-115, *infra*.

¹⁰² See Uniform Act section 7(a).

(with the purchase price set at a price based on the value of the property multiplied by the share of the cotenant seeking partition).¹⁰³ Other more complex provisions also apply.¹⁰⁴

4. *Fair, Streamlined Procedures.* The Uniform Act also incorporates several important procedural provisions that address efficiency and fairness. These provisions include:

a. *Notice.* The Uniform Act does not affect how complaints are served in partition actions,¹⁰⁵ but provides for a supplemental form of notice if notice by publication is to be employed. Under such circumstances, a partition plaintiff is obliged to post and maintain

a conspicuous sign on the property that is the subject of the action. The sign must state that the action has commenced and identify the name and address of the court and the common designation by which the property is known. The court may require the plaintiff to publish on the sign the name of the plaintiff and the known defendants.¹⁰⁶

Such notice appears designed to help get information about pending partition proceedings out to community members who may know about the whereabouts of unknown heirs.

b. *Streamlined Assessment of Property Value at An Early Stage.* Under Section 6 of the Uniform Act, once the court has determined that the property subject to a partition action constitutes “heirs property,” it “shall determine the fair market value of the property by ordering an appraisal,” using procedures specified by that section.¹⁰⁷ Alternatively, if all cotenants agree to the value of the property or to another method of valuation, the court is to adopt the cotenants’ valuation or the value established by their agreed method of valuation.¹⁰⁸ Although the Uniform Act provides for a court-ordered appraisal as the basic method for valuation, the court retains discretion to hold a hearing to determine whether the evidentiary value of an appraisal is outweighed by its cost; if so,

¹⁰³ *Id.* at section 7(b).

¹⁰⁴ *Id.* at Sections 7(c) and (d). Subsection 7(c) specifies that the purchase price to buy out a cotenant that requested partition by sale “is the value of the entire parcel determined under Section 6 multiplied by the cotenant’s fractional interest of the entire parcel.” Subsection 7(d) provides a sequence of steps that address the possibilities of one, more than one, or no cotenants wishing to buy out a cotenant who has requested partition.

¹⁰⁵ See Uniform Act Section 4(a).

¹⁰⁶ See Uniform Act Section 4(b).

¹⁰⁷ Uniform Act at section 6(a).

¹⁰⁸ *Id.* at Section 6(b). Comment 2, addressing Section 6(b), states that:

The court may not adopt a monetary value for the property that only some of the cotenants but not others have agreed upon or a valuation derived from an alternative method of valuation that only some of the cotenants have agreed upon even if the only cotenants that have not agreed to the value of the property or to another method of valuation are cotenants that are unknown, unlocatable, or otherwise remain unascertained.

Comment 3 to Section 6 of the Uniform Act give as an example the possibility that co-tenants would opt to secure opinions of the property value from two real estate brokers and average those results, since such a method might be less expensive than paying for an appraisal.

the court is authorized to make its own determination of the property's value and notify the parties accordingly.¹⁰⁹

If the court decides to order an appraisal, it then designates a disinterested appraiser to determine the fair market value of the property as if held in fee simple title by a sole owner.¹¹⁰ The appraiser is then required to file a sworn or certified appraisal with the court.¹¹¹ Within ten days, the court is to notify the parties of the appraiser's determination of fair market value, the opportunity to review the appraisal in the clerk's office, and the opportunity to specify and file any objection to the appraisal with the court within 30 days.¹¹² No sooner than 30 days after this initial notice, the court is to hold a hearing considering any objections and any other evidence of value tendered by the parties.¹¹³ Before considering the merits of the partition action, the court is then to determine the fair market value of the property and notify the parties accordingly.¹¹⁴

This system of determining the fair market value of the property is notable in several respects. First, it moves the process of valuing the property forward to an early stage in the partition proceedings so that cotenants will have realistic, objective data to guide their decisions and accordingly reduce posturing in their negotiations. Second, it provides incentives and a mechanism to reduce the cost of setting a fair market value. Cotenants can opt for a less-costly system of setting fair market value if the cotenants wish to do so, but even if they do not, the cost of a single court-ordered appraisal is likely to be less expensive than paying commissioners both to determine whether the property can be divided in kind and what its fair market value is likely to be (on the latter point, they might well need an appraiser in any event). Third, as discussed below, it uses a neutral appraiser overseen by the court to set the baseline price (in the event that property is to be sold). That approach may eliminate the undervaluing of property that can occur when an auction mechanism is employed in the absence of disinterested competing bidders. Finally, this system reflects good practice developed in a number of states in dealing court-ordered sales of property.¹¹⁵

¹⁰⁹ See Uniform Act Section 6(c).

¹¹⁰ *Id.* at Section 6(d).

¹¹¹ *Id.*

¹¹² *Id.* at Section 6(e).

¹¹³ *Id.* at Section 6(f).

¹¹⁴ *Id.* at Section 6(g).

¹¹⁵ See Comments 1 and 4 to Section 6 of the Uniform Act. Comment 1 states:

Section 6(a): Some states require that any property that may be subject to partition by sale shall first be appraised before a court decides whether to order partition in kind or partition by sale. *See, e.g.,* N.M. STAT. § 42-5-7 (2009). Other states require that nearly all real property that is to be sold under an order or a judgment of a court must be appraised before the property is sold. *See, e.g.,* KY. REV. STAT. ANN. § 426.520 (West 2010).

Comment 4 states:

Section 6(d): Under certain circumstances, some states require that property that is to be sold by partition by sale be appraised by one or more disinterested persons. *See, e.g.,* MINN. STAT. § 558.17 (2009) (providing that property subject to partition by sale shall be appraised by two or more disinterested persons before the property is sold if the court orders the property sold at a private sale instead of at a public auction). In some instances, states require that certain court-appointed real estate appraisers must be state-certified and in good standing with the state appraisal authorities. *See, e.g.,* OKLA. STAT. tit. 52, § 318.5 (2009).

c. *Option to Use of Open-Market, Sale, or Auction.* In keeping with the judgment that a realistic, objective fair market value of property should be set early in the partition process, the Uniform Act creates a preference for an open-market sale, unless the court determines that sale by sealed bids or at auction would be more economically advantageous and in the best interests of the tenants as a group.¹¹⁶ If the presumptive open-market sale approach is used, the court notifies the parties that they have ten days to decide upon an appropriate real estate broker; failing the parties' agreement, the court appoints a broker and sets a commission.¹¹⁷ The broker is required to offer the sale in a commercially reasonable manner with a minimum price tied to the fair market value previously determined.¹¹⁸ If the broker does not receive a bid at the fair market value within a reasonable time, the court may hold a hearing and approve the highest reasonable offer, redetermine the value, or order the property to be sold by sealed bid or auction subject to court oversight.¹¹⁹ In contrast to current common practice, a cotenant purchaser is entitled to receive a credit toward the price to be paid based on the value of that cotenant's existing share.¹²⁰

d. *Attorneys' Roles and Resources: Impartiality and Fees.*

i. *Impartiality of Attorneys as Commissioners.* Section 5 of the Uniform Act provides that:

If the court appoints [commissioners] pursuant to [the general partition statute], each [commissioner], in addition to the requirements and disqualifications applicable to [commissioners] in [the general partition statute], must be disinterested and impartial and *not a party to or a participant in the action*. [emphasis added]

Under this provision, attorneys representing parties in partition actions would be prohibited from serving as commissioners. As discussed above, the 2009 North Carolina legislative study committee had recommended a similar prohibition, but that recommendation was not adopted.¹²¹ Subsequently the Formal Ethics Opinion adopted by the North Carolina State Bar in 2011 significantly limited the potential for attorneys who concurrently represented parties in a partition action from serving as commissioners.¹²² This provision of the Uniform Act appears to limit the potential for attorneys to serve as commissioners slightly more comprehensively, and does so as a statutory matter so as to foster transparency.

ii. *Attorney's Fees.* The Uniform Act does not expressly address the question of attorney's fees in partition actions. As discussed earlier, some states have

¹¹⁶ Uniform Act at Section 10(a)

¹¹⁷ *Id.* at Section 10(b)

¹¹⁸ *Id.*

¹¹⁹ *Id.* at Section 10(d) and (e).

¹²⁰ *Id.* at Section 10(f).

¹²¹ See text at note 33 and following, *supra*

¹²² See text following note 75, *supra*.

historically required litigants to contribute to the attorney's fees of the party instigating a partition action even if the litigation opposes the proposed partition.¹²³ Others have seemingly limited such required contributions based on the "common benefit" doctrine.¹²⁴

In some ways it is surprising that the Uniform Act drafting committee chose not to address the issue of attorney's fees and the parties' obligations toward payment of such fees and other costs of partition. Professor Thomas Mitchell, the ULC UHPA's reporter, has explained these developments in a thoughtful law review article discussing the Uniform Act:

The drafting committee was often able to reach compromises that satisfied most or all of the members of the drafting committee and the observers. However, the issue of the circumstances in which attorney's fees could be awarded in partition actions under the UHPA was decided in a way that left some members of the drafting committee and an even larger number of the observers dissatisfied, at least at the time this decision was made. The UHPA drafts up until the final meeting of the drafting committee included significant language restricting the ability of a court to award attorney's fees in a partition action, consistent with the American rule on attorney's fees. However, the ULC's leadership expressed serious concern at the final drafting committee meeting that such a provision on attorney's fees could harm enactment efforts in some states that otherwise might be inclined to enact the UHPA into law. After hearing this concern, the commissioners on the drafting committee decided in the end against including any provision in the UHPA that would restrict the ability of a court to award attorney's fees in partition actions decided under the UHPA.²⁸⁶

Even though the UHPA as approved does not prohibit a court from making an attorney's fee award in a contested partition, the act does include significant provisions that serve as "shark repellent" as one law professor stated in a written submission to the drafting committee, for those cotenants interested in forcing the sale of family-owned, tenancy-in-common property in the hopes that such a cotenant could acquire the property for a fire sale price. Among other provisions that would disincentivize such a cotenant from filing a partition action in order to acquire family-owned property are the buyout provision, the provision fortifying the preference for partition in kind, and the provision requiring that partition sales be conducted in a manner designed to maximize the sales price with the open-market sale representing the preferred sales method.¹²⁵

While the Uniform Act's drafting committee did not recommend reform or clarification of standards for attorney's fee awards in partition actions, it seems incumbent on North Carolina's decision-makers to do so. It seems fundamentally unfair to require property owners who resist demands for partition to be required to pay for not only their own attorney's fees but also to cover or even share the attorney's fees

¹²³ See text at notes 76-79, *supra*.

¹²⁴ See notes 76-77 and accompanying text, *supra*.

¹²⁵ See Thomas Mitchell, *Reforming*, *supra* note 70 at 59-60.

incurred by the proponent of partition. Many property owners of “heirs property” do not have the resources to cover their own attorney’s fee costs, let alone the attorney’s fees of those who would force them to sell family property. The traditional American Rule calls for litigants to bear their own costs, and that would seem appropriate under these circumstances. Alternatively, a clear understanding of the “common benefit” doctrine might put all co-tenants equally at risk of demonstrating that associated costs are for the benefit of all, rather than only for the benefit of a particular proponent or opponent of partition.

e. Management of Assets from Unknown Heirs Property. The dilemma of dealing with “unknown heirs” is a real one.¹²⁶ Professor Jesse Richardson has written thoughtfully about the ways in which the Uniform Act fails to deal with this issue as fully as might be needed.¹²⁷ The gist of the problem is that after several generations in which land descends through families, subsequent heirs may move away to other places and become unknown to their cotenants and family members. They may also themselves be unclear about their property rights or responsibilities and about what is happening to property that they may have inherited over the years. It might seem that unknown heirs would in due course lose their rights to real property in North Carolina, but common law in this state creates a presumption that cotenants hold as fiduciaries for fellow cotenants.¹²⁸ Absent an actual ouster (when a distant heir might seek to establish rights to occupy concurrently held property), or constructive ouster, adverse possession is not triggered.¹²⁹ Under this regime, then, distant heirs’ claims are not blocked by adverse possession doctrine and thus endure over the years. Trying to track down unknown heirs can be expensive and can give rise to considerable uncertainty.¹³⁰ Often, only developers who desire to acquire comprehensive property rights are inclined to expend the resources to track down at least one unknown heir and acquire that heir’s interests in order to force a partition by sale under the current legal structure so as to acquire fee simple rights to a concurrently owned parcel in the path of development.¹³¹

The Uniform Act does not attempt to address the problem of unknown heirs generally or to suggest reforms to adverse possession law. Instead, in Section 8(j) the

¹²⁶ For an excellent case study on issues arising from heirs property, including the challenges of dealing with unknown heirs, see Faith Rivers [James], *Restoring the Bundle of Rights: Preserving Heirs’ Property in Coastal South Carolina*, ABA Property Preservation Task Force Continuing Legal Education Program, http://www.americanbar.org/content/dam/aba/events/real_property_trust_estate/symposia/2006/12_property_preservation.authcheckdam.pdf (hereinafter Rivers-James, *Restoring*). For a discussion of views of northern versus southern heirs, see *A Practical Perspective for Developing Heirs Property with Family Limited Liability Companies*, *id.* at 581-83 (hereinafter referred to as “*Heirs Property and Family*”)

¹²⁷ See Richardson, *Symptoms*, *supra* note 43, at 565-67.

¹²⁸ See Strong’s N.C. Index, Adverse Possession (4th edition) § 44 (“As between tenants in common, adverse possession is governed by its own set of rules. A tenant in common has the right to possess the property and is presumed to be holding under his or her true title. Between tenants in common, then, possession by one tenant for less than the statutory period cannot be adverse to the others as the possession of one tenant in common is, in law, the possession of all of them, and the possession of any one of them inures to the benefit of all. Accordingly, before a person can adversely possess land held in cotenancy, he or she must effect an ouster, either actual or constructive, of his or her co-owners.”) (footnotes omitted).

¹²⁹ *Id.*

¹³⁰ See *Heirs Property and Family*, *supra* note 126, estimating cost of clearing title with unknown heirs as \$5,000.

¹³¹ See Richardson, *supra* note 43, at 535-37 (“third party partition scenario”).

Uniform Act protects the rights of unknown or unlocatable heirs by holding their interests intact if the property is partitioned in kind.¹³²

Additional questions may be raised, however. If the best possible notice has been used, and unknown heirs have been represented by an attorney or guardian ad litem, would it be appropriate to move beyond partitioning and holding their shares in kind (whether the rest of the property is partitioned in kind or sold)? Would their interests be adequately protected if their share of the property were also sold and the resulting funds held and invested until such time as they might lay claim? That approach seems to be embodied in existing North Carolina statutes. Section 46-34 of the General Statutes (“Shares to persons unknown or not sui juris secured”) reads as follows:

When a sale is made under this Chapter [relating to partition], and any party to the proceedings be an infant, non compos mentis, imprisoned, or beyond the limits of the State, or when the name of any tenant in common is not known, it is the duty of the court to decree the share of such party, in the proceeds of sale, to be so invested or settled that the same may be secured to such party or his real representative.

While such proceeds would ordinarily be invested by the clerk of superior court,¹³³ and transferred to the State Treasurer after one year,¹³⁴ it might be better to have the clerk forward them to the State Treasurer where they could be publicized along with other unclaimed property.¹³⁵ That approach would be the most likely means of helping unknown parties know about and claim the related funds.

Another option might be to reform North Carolina’s adverse possession law by changing the common law presumption against “ousting” of a cotenant not in possession

¹³² Comments to section 10(j) explain that several states have statutory provisions which permit a court to order a partition in kind and to designate a part of the property for cotenants who remain unknown or unlocatable at the conclusion of the action. See, e.g., ALASKA STAT. § 09.45.290 (2010); ARK. CODE ANN. § 18-60-414 (2010); CAL. CIV. PROC. CODE § 873.270 (West 2010); HAW. REV. STAT. § 668-9 (2010); MICH. COMP. LAWS § 3.402 (2010); N.D. CENT. CODE § 32-16-12 (2010); OR. REV. STAT. § 105.245 (2010); S.D. CODIFIED LAWS § 21-45-15 (2010); UTAH CODE ANN. § 78B-6-1212 (2010); WASH. REV. CODE § 7.52.080 (2010).

¹³³ The clerk of superior court may invest the unknown heirs' proceeds under G.S. 7A-112 or deposit them in an interest-bearing account under G.S. 7A-112.1. The clerk shall assess fees under G.S. 7A-308.1. The unknown heirs may recover any interest and investment earnings that remain after the clerk assesses fees. See G.S. 7A-308.1.

¹³⁴ G.S. 116B-53(c)(12) (providing that “[p]roperty held by a court, government, governmental subdivision, agency, or instrumentality” is abandoned if it remains unclaimed by the apparent owner after one year). After one year, the clerk of superior court is directed to mail notice to the last known address of the unknown heir under G.S. 116B-59 and to file a report to the State Treasurer under G.S. 116B-60. Upon filing the report, the clerk is required to transfer the unknown heirs' proceeds, along with any interest or investment earnings less the fees assessed by the clerk, to the State Treasurer's custody. G.S. 116B-61(a). With written permission from the State Treasurer, the clerk may transfer the unknown heirs' proceeds before one year. See G.S. 116B-69(b); 20 NCAC 08 .0110.

¹³⁵ For the State Treasurer’s website listing unclaimed property, see https://www.nctreasurer.com/Claim-Your-Cash/about_the_nc_cash_program/Pages/default.aspx

by other cotenants who are in possession.¹³⁶ Currently, the presumption against ouster of co-tenants flips after 20 years of a cotenant's possession without dispute by a fellow cotenant or an action by the cotenant in possession that indicates an acknowledgment of a cotenant's rights.¹³⁷ If notice has been given to the community at large about a partition action, an unknown co-tenant has been represented by an attorney or guardian ad litem in related proceedings, the share of the unknown co-tenants adjudicated by the court is established, and the availability of resulting assets are made known through the office of the State Treasurer, it might be reasonable to conclude that adverse possession under color of title could run against remaining property divided in kind and held on behalf of

¹³⁶ For discussion of related ideas, see Thomas Mitchell, *Reconstruction*, *supra* note 70, at 564-65:

[S]ome proposed changes to the partition and adverse possession laws would require the reallocation of many rights in the tenancy in common to the tenants in possession and a significant reduction of the rights of the tenants not in possession. For example, C. Scott Graber has proposed that cotenants in possession be given the right to constructively oust other cotenants after twenty years with the exception of "those who derived their interest by devise or inheritance from the same source as the claiming co-tenant." Graber also proposes that cotenants in possession be given the right to force a sale of the interests held by unknown heirs. Similarly, Harold A. McDougall proposes, *inter alia*, that heirs who have been in possession for a long time be given the right to purchase the property at a private sale once a partition act is initiated. The proceeds of the sale would then be held in escrow for the other heirs and any unclaimed portion eventually would be refunded to the purchasing heir. He also proposes that the adverse possession laws be changed to make it easier for a tenant in possession to possess the property adversely against absentee heirs. As part of his proposal to make it easier for a tenant in possession to constructively oust a tenant not in possession, McDougall would permit tenants in possession to tack the occupancy of their immediate predecessors in title in order to reduce the amount of time it would take to satisfy the statutory adverse possession period.
[footnotes omitted].

Professor Mitchell further commented that

Providing "in" tenants with greater rights at the expense of "out" tenants would benefit rural African Americans who want to continue farming agricultural land. Such proposals are, however, problematic for a number of reasons. First, an overarching problem for many of these proposals is the lack of individual fairness afforded to certain cotenants. Requiring individuals with vested property rights to suffer economic loss in the process of consolidation should be avoided if there are fairer alternatives. Such proposals, moreover, violate a central tenet of international land consolidation - individuals should not suffer economic loss in the process of consolidation. Second, these proposals do not provide a long-term remedy. For example, under the constructive ouster proposal, the problems of fractionation will recur if the tenant in possession dies intestate. Given the overall rate of will making for both rural African Americans landowners and other poor rural Americans, this recurrence is more likely than not. In addition, vesting a tenant in possession with the right to force a sale of the property assumes that this tenant may be well-positioned to maintain the property. To the extent that much of heir property has been underutilized, however, there may be instances in which a poor tenant in possession has elected to remain in possession in order to live rent-free in a dwelling on the family property. If this person receives the power to force a sale of the property, she could be susceptible to land speculators who might agree to finance the sale provided that the land is transferred immediately thereafter. Even if this tenant in possession could acquire the property for herself, she may ultimately lose the property through foreclosure, tax sale, or distress sale unless her financial status significantly improves.
[footnotes omitted]

¹³⁷ For discussion of the constructive ouster doctrine, see *Winton v. Scott*, 80 N.C. App. 409 (NC App., 1986); *Atl. Coast Props. v. Saunders*, 777 S.E.2d 292 (NC App. 2015). A New York statute restates the presumption that possession by one co-tenant is the possession of all, but limits the presumption to 10 years. NY Real Prop Actions & Possession Law sec. 541. See *Myers v. Bartholomew*, 697 N.E.2d 160 (NY 1998). Thanks to Professor John Orth for this reference.

unknown heirs if that portion of the original property is in fact used openly and notoriously by known co-tenants who pay taxes and otherwise act as true owners of the set-aside portion, consistent with the adverse possession under color of title statute for the statutory period of 7 years.¹³⁸

f. *Rights of Tenants Who Take Responsibilities Seriously.* A common problem for cotenants holding “heirs property” arises when one or a small number of such cotenants pay carrying costs (taxes, insurance or mortgage costs) in order to assure that the property will be kept in the family rather than be sold in default. The responsible cotenant may be able to assert a right to have others contribute to these costs at the time of partition.¹³⁹ If the responsible cotenant has occupied the property exclusively in the interim, the claim for contribution may be set against the value of occupation in some jurisdictions.¹⁴⁰

The Uniform Act addresses this problem only to a limited extent. One of the factors to be considered under section 9(6) in determining whether “heirs property” should be partitioned in kind or by sale is:

¹³⁸ See N.C. Gen. Stat. § 1-38 (seven years’ possession under color of title). Another approach worth considering may be that employed by North Carolina’s Torrens Act allowing for registered land title. Thanks to Professor Monica Kalo for this suggestion. See N.C. Gen. Stat. Chapter 43, particularly § 43-10, relating to notice, discussed at 25A N.C. Index 4th Registration and Probate § 127. For an extensive discussion of North Carolina’s Torrens System, see Professor John Orth’s analysis, forthcoming in CAMPBELL LAW REVIEW (2017). Orth describes the operation of the Torrens system in the following terms:

A petitioner in “peaceable possession” of the land and claiming “an estate of inheritance therein,” provides a metes-and-bounds description of the land, a statement of how the land was acquired and whether it is presently occupied, and the names and addresses of all interested parties, including adjacent landowners. Interested parties are served with actual notice; others receive publication notice. An official examiner of titles, who must be a licensed attorney, holds a hearing and reports to the court on the state of the title. If the examiner approves the title and no adverse claims are presented, the court confirms the petitioner’s title and enters a decree for its registration, which is “conclusive evidence” of the state of the title. The registrar then enters the certificate in the registry and issues a duplicate to the owner.

Once registered, the title is free of all claims not noted on the certificate “except in cases of fraud to which [the petitioner] is a party” or in which the registration was “procured through forgery.” A Torrens title cannot be lost to adverse possession. Any action challenging a registered title is barred unless filed within twelve months after registration. An assurance fund is available to indemnify any person who lost an interest in the land “through fraud or negligence” in the registration or because of a mistake on the certificate or in the registry. Actions for compensation from the assurance fund must be brought within three years of registration. A registered owner may release the title from the Torrens system by filing a statement with the registrar; after release, the land may be conveyed by “any form of conveyance other than the certificate of title.”^[16] (footnotes omitted).

¹³⁹ For a national discussion of incidents associated with tenancy in common, see John Orth, 4-32 Thompson on Real Property, Thomas Editions § 32.07(b) (action for contribution); *id.* at § 32.07(b) (action of account)

¹⁴⁰ *Id.*

the degree to which the cotenants have contributed their pro rata share of the property taxes, insurance, and other expenses associated with maintaining ownership of the property or have contributed to the physical improvement, maintenance, or upkeep of the property.

Seemingly, those cotenants who have taken on particular responsibilities (to cover costs of taxes, insurance and mortgage payments) may prefer to continue to hold a particular portion of the property in kind rather than to put the property up for sale. They may seek to have certain portions of the property allocated to them (perhaps the portion of the property on which a historic home place is situated), while letting other co-tenants go their own way and pick up associated tax costs on their individual in-kind undeveloped segments of the land.

It may be important to clarify the extent to which, in connection with a partition of “heirs property” in kind or by sale, those co-tenants who have taken responsibility for a disproportionate load in terms of carrying costs (taxes, insurance, mortgage) could have their expenditures considered through an “accounting” at the time of partition. In traditional partition proceedings involving sale of the property as a whole (that is, in circumstances that do not focus on the special issues affecting “heirs property”), expenditures of this sort would be considered as part of a corollary “accounting” that might also offset the value received by occupying cotenants.¹⁴¹ How should taking on the

¹⁴¹ North Carolina currently addresses the rights to recover tax payments from co-tenants in the following terms under N.C. Gen. Stat. § 105-363 (“Remedies of cotenants and joint owners of real property”):

(a) Payment of Taxes on Share of One Cotenant.--Any one of several tenants in common or joint tenants (other than copartners) of real property may pay that portion of the taxes, interest, and costs that are a lien upon his undivided share of the property and thereby release the tax lien from his share. Thereafter, in any partition sale of the property the share of the joint owner who has paid his portion of the taxes shall be set apart free from the tax lien, and his share of the proceeds of any sale shall not be diminished by disbursements to pay any taxes, interest, or costs. In the event the tax lien is foreclosed and the property is sold for failure to pay taxes, the share of any joint owner who has paid his portion of the taxes shall be excepted from the advertisement and sale.

(b) Payment of Entire Amount of Taxes by One Cotenant.--Any one of several tenants in common or joint tenants (other than copartners) of real property may pay the entire amount of the taxes, interest, and costs constituting a lien on the property, and any amount so paid that is in excess of his share of the taxes, interest, and costs and that was not paid through agreement with or on behalf of the other joint owners shall constitute a lien in his favor upon the shares of the other joint owners. Such a lien may be enforced in a proceeding for actual partition, a proceeding for partition and sale, or by any other appropriate judicial proceeding.

See also 1-7 WEBSTER'S REAL ESTATE LAW IN NORTH CAROLINA § 7.10 (discussing taxes and interest):

In North Carolina, there is a statutory procedure by which a tenant in common or joint tenant can obtain a release of a tax lien from his share by payment of a proportionate share of the taxes. The statute also allows a tenant in common or joint tenant to pay the entire amount of the taxes under specified conditions and thereby obtain a lien upon the shares of the other joint owners. This statute is apparently meant to refer to situations where all of the tenants are on the same footing; i.e., with all or none being in possession. A co-tenant is also entitled to reimbursement with respect to interest paid by him on an existing encumbrance. There are no cases in North Carolina on point but it is generally held that if the co-tenant who pays the taxes is in exclusive possession of the common property, he is not entitled to contribution for expenditures made for ordinary taxes

responsibility for carrying costs be treated within the family context, either when family property is divided in kind or when cotenant rights to family property is sold as part of a cotenant buyout?

The answer to this question is not so clear. It appears that the drafting committee of the Uniform Act did not take on this issue since it is one that can arise with any kind of tenancy in common, and is not peculiar to “heirs property” situations.¹⁴² Accordingly, in the context of North Carolina’s deliberations, it may be appropriate to return to first principles and consider: what approach would be most likely to create incentives for carrying costs to be efficiently and fairly distributed *within a family*? Ideally, family members would create their own written agreement on this and other points, but that ideal may be difficult to achieve in practice. Surfacing expectations is often desirable to avoid conflicts at a later point. Accordingly, it would be better for cotenants to deal with unclear expectations earlier rather than later, and it would be better for them to balance their respective books earlier rather than later.

It is true that common law, and in some instances general partition statutes, dictate how the accounting process should proceed in general. Although the Uniform Act is designed as a supplement to standard partition statutes, there is much to be said for including within its provisions answers to common questions facing those in situations it is intended to regulate, even if those questions do not have statutory answers to partitions generally. For example, a specific statutory solution might not be needed in a commercial setting or in a setting where cotenants agreements might be more commonly used, the dilemmas facing those with “heirs property” may need a presumptive statutory solution that takes into account the problems of unknown heirs, lack of resources, and limited guidance from lawyers for historical reasons. For example, the Uniform Act’s “co-tenant buyout” provisions might be adjusted to allow a supervising court to readjust shares in property based on some co-tenants’ expenditures for carrying costs, or to create liens on shares of other cotenants based on net costs undertaken by those taking on special responsibilities, rather than requiring cotenants to resolve such claims by paying out cash to balance out their obligations.

IV. Proposals for Change: Other Possibilities

This article is intended to inform North Carolina’s real property practitioners about possible changes in state partition law, by outlining broad policy considerations and describing changes that might arise if the Uniform Partition of Heirs Property Act were adopted here. Other changes might also be considered by the General Statutes Commission in the course of its review of state partition law. The ideas and comments that follow do not represent the GSC’s views, but are only possibilities that have occurred

assessed against the property during his occupancy. The same rule is applicable to payments of ordinary interest. (footnotes omitted).

Perhaps it would be advisable to provide explicitly by statute for handling of carrying costs that go beyond taxes (that is, including mortgage claims against the whole property and insurance costs) as part of a new statutory article addressing heirs property.

¹⁴² Communication with Professor Thomas Mitchell (on file with other).

to the author in preparing this article. They are sketched as a preliminary matter, in order to generate additional discussion and debate.

Since 2009, when North Carolina's General Assembly adopted limited reforms to its partition statutes, several important events have transpired. A significant Formal Ethics Opinion was announced by the state bar, as discussed above. A perfected version of the Uniform Partition of Heirs Property Act has been adopted by the Uniform Law Commissioners, and that Uniform Act has been adopted by 9 states.¹⁴³

The author, as a member of General Statutes Commission, wishes to engage with real property practitioners to ask their counsel in developing the best possible partition law here in North Carolina. This section raises questions beyond those discussed with respect to the Uniform Act (as addressed in section IV.A). Readers should bear in mind that these ideas are the author's alone and are not necessarily shared by other members of the GSC.

A. *Streamlined and Updated Procedures for Partition Proceedings.* The Commissioners on Uniform Laws noted in their discussion of the Uniform Partition of Heirs Property Act that some of the improvements embodied in that limited context might be worth consideration more broadly. For example, would it be worth considering whether North Carolina should adopt an optional streamlined partition procedure that might be selected by litigants that tracks key provision of the UHPA? Would it be beneficial to provide *all* partition litigants (not just those with "heirs property") with an option to petition the court to move first to a valuation of the property's fair market value using an appraiser or an alternative mechanism agreed by the parties in order to facilitate decision making?¹⁴⁴

B. *Disinterested Decision-Makers.* The North Carolina State Bar issued a formal ethics opinion in 2011 about the role of attorneys in partition proceedings. Should statutory provisions be adopted to help attorneys avoid conflicts of interest in all partition proceedings?

C. *Commissioners v. Appraisers.* North Carolina has a long-standing history of using appointed commissioners in partition proceedings, to guide decisions regarding in-kind or by-sale partitions, and to handle partition sales. Should the law be updated more generally to streamline and reduce costs of partition by employing appraisers at an earlier stage in the proceeding? Appointing an appraiser (rather than paying commissioners who may in turn appoint an appraiser not under court supervision) might save costs to litigants.

D. *Limited Interests.* Is there a better or more streamlined process by which non-fee interests (timber or mineral interests, or life estates) might be handled in partition

¹⁴³ See note 37 *supra*.

¹⁴⁴ The author raised this question with Benjamin Orzeske, one of the Uniform Law Commissioners involved in the Uniform Act. He said that other states had not yet taken such a step but thought it was a good idea. Communication on file with the author.

proceedings? Might a simplified process modeled on the UHPA be employed for partitions of land that is of limited value (below a particular level of value)?

E. Reform of Attorney's Fees and Costs Provisions. Should North Carolina return to the traditional rule in which each party is responsible for their own attorney's fees rather than requiring cotenants opposing partition to pay a substantial portion of the attorney's fees and costs of a party seeking partition that they oppose?

F. Partition and Accounting. Should North Carolina more explicitly address by statute the intersection of partition proceedings and accounting proceedings? When should cotenants who have borne the bulk of carrying costs relating to concurrently held property be able to seek payment or an offset of costs in an accounting with fellow cotenants?

Undoubtedly, additional ideas will emerge in connection with the ongoing deliberations of the General Statutes Commission. This article is intended to encourage knowledgeable practitioners to share their insights as this process moves forward.

Conclusion

This article has sought to inform interested real property practitioners about work currently underway in the North Carolina General Statutes Commission regarding possible partition law reform. It is especially important for lawyers who remember deliberations that occurred in 2008-2009 to recognize that the current discussion differs in significant ways.

After providing a brief overview of North Carolina's current statutes on partition, the article has traced developments from that earlier period and emphasized areas in which reforms were adopted or proposed and not adopted. It has also provided information on a 2011 Ethics Opinion from the North Carolina State Bar that clarified the ethical responsibilities of attorneys involved in partition proceedings as counsel for parties or as commissioners or parties responsible for handling partition sales.

The article then offered observations about two driving policy considerations that arise in connection with partition actions: efficiency and fairness. After fleshing out these policy issues, the article provided an in-depth summary of the Uniform Partition of Heirs Property Act, promulgated by the Uniform Law Commission in 2010, and now adopted or proposed for adoption in 13 states. The goal of this part of the article is to help North Carolina attorneys understand the nuances of the Uniform Act, its application *only* to defined "heirs property," but its promise as a source for updated, fairer, and more efficient partition procedures that might be made an option more broadly. The article concludes by briefly sketching potential further partition law reforms and invites readers to offer their suggestions and recommendations to the author or to the General Statutes Commission.

These "new thoughts on an ancient remedy" are offered here at length in order to encourage careful deliberation on an important topic that affects all of those holding property as tenants in common. In the author's view, adoption of the Uniform Partition

of Heirs Property Act is particularly important in order to remedy ongoing land loss that has sorely afflicted some of North Carolina's most vulnerable populations. She hopes that others will engage with her in attempting to bring about needed reforms.